83-729

No.

Office - Supreme Court, U.S.
FILED
NOV 2 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

THE HONORABLE GEORGE V. HANSEN,
Member of Congress, 2D District of Idaho,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Frank A. S. Campbell
William Stoll Hemsley, Jr.
HEMSLEY & CAMPBELL
1111 Nineteenth Street, N.W.
Suite 301
Washington, D.C. 20036
(202) 659-0550

Counsel for Petitioner

November 2, 1983

QUESTIONS PRESENTED

1. Whether interlocutory appellate review is available to Members of Congress in federal criminal cases not only for challenges to an indictment based upon the Speech or Debate Clause and general separation of powers principles, but also for any legal claim readily resolved before trial which would, if upheld, prevent a Member's trial on a pending indictment.

2. Whether the financial disclosure statements filed by Members of the United States House of Representatives with the House Clerk and Committee on Standards of Official Conduct constitute an integral part of the communicative process by which Congressmen participate in the discharge by the House of its textually based Constitutional responsibility to supervise and discipline the conduct of its Members and as such are covered by the Speech or Debate Clause and unavailable as the basis of a criminal prosecution of a Member of Congress.

INDEX

	Page
Questions Presented	i
Index	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. THE DECISION OF THE COURT OF APPEALS DISMISSING THE CONGRESSMAN'S APPEAL RELATING TO CLAIMS BASED ON GROUNDS OTHER THAN THE SPEECH OR DEBATE CLAUSE CREATES A CONFLICT IN THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL APPELLATE JURISDICTION WHICH IMPLICATES THE FUNCTIONING OF OUR REPRESENTATIVE FORM OF GOVERNMENT	6
II. BECAUSE THE EXECUTIVE BRANCH IS NOW ATTEMPTING TO USE EIGA REPORTS AS A BASIS FOR PROSECUTING MEMBERS OF CONGRESS, THIS COURT MUST DETERMINE WHETHER THE FILING OF THOSE REPORTS WITH THE HOUSE OF REPRESENTATIVES CONSTITUTES AN ACTIVITY BY CONGRESSMEN PROTECTED BY THE SPEECH OR DEBATE CLAUSE	16
Conclusion	21
Certificate of Service	22
Appendix:	
Court of Appeals Order of Summary Affirmance and Dismissal Filed August 1, 1983	A.1

INDEX (continued)

	Page
Appendix (Continued):	
Court of Appeals Order Refusing Immediate Issuance of the Mandate Filed September 6, 1983	B.1
Court of Appeals Order Denying Rehearing Filed September 26, 1983	C.1
Court of Appeals Order Denying Rehearing *En Banc* Filed September 26, 1983	D.1
Court of Appeals Order Staying Issuance of the Mandate Filed October 11, 1983	E.1
District Court Order and Opinion Denying Motion to Dismiss Indictment Filed June 13, 1983	F.1
District Court Supplemental Order Filed June 16, 1983	G.1

TABLE OF AUTHORITIES

CASES	Page
Abney v. *United States*, 431 U.S. 651 (1977)	12
Benford v. *American Broadcasting Companies, Inc.*, No. 81-1200 (4th Cir. June 17, 1981)	16
Firestone Tire and Rubber Co. v. *Risjord*, 449 U.S. 368 (1981)	15
Gravel v. *United States*, 408 U.S. 606 (1972)	3,18,19
Helstoski v. *Meanor*, 442 U.S. 500 (1979)	4,6,12, 15,16,18
Kilbourn v. *Thompson*, 103 U.S. 168 (1881)	12
Ray v. *Proxmire*, 581 F.2d 998 (D.C. Cir. 1978)	20
Scarlett v. *Seaboard Coast Line R. Co.*, 676 F.2d 1043 (5th Cir. 1982)	16
United States v. *Bramblett*, 348 U.S. 503 (1955)	21
United States v. *Brizendine*, 659 F.2d 215 (D.C. Cir. 1981)	5,10, 13,14,15,16
United States v. *Carney*, 665 F.2d 1064 (D.C. Cir. 1981)	5,13
United States v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979)	21
United States v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980)	3,19,20
United States v. *Hastings*, 681 F.2d 706 (11th Cir. 1982)	7
United States ex rel. Hollander v. *Clay*, 420 F. Supp. 853 (D.D.C. 1976)	21
United States v. *Johnson*, 383 U.S. 169 (1966)	17

TABLE OF AUTHORITIES (Continued)

CASES	Page
United States v. *MacDonald*, 435 U.S. 850 (1978)	14
United States v. *Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980)	4,5,7-9, 14,15
United States v. *Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983)	17,18, 20

CONSTITUTION, STATUTES AND RULES

U.S. Const. art. I, § 5, cl. 2.	2,18
U.S. Const. art. I, § 6, cl. 1.	Passim
United States Code, Title 2:	
2 U.S.C. § 701 *et seq.*	3,18
United States Code, Title 18:	
18 U.S.C. § 1001	3,19,20,21
United States Code, Title 28:	
28 U.S.C. § 1291	2,7
Rules of the House of Representatives, Rule XLIV, 98th Cong., 1st Sess. (1983)	3,21

No.

IN THE

Supreme Court of the United States

October Term, 1983

THE HONORABLE GEORGE V. HANSEN,
Member of Congress, 2D District of Idaho,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner George V. Hansen respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 1, 1983.

OPINIONS BELOW

The unreported judgment and order of the Court of Appeals, appears in the Appendix hereto at A.1. The opinion of the United States District Court for the District of Columbia, which was rendered on June 13, 1983 and summarily affirmed in part by the appellate court panel, is reported at 566 F. Supp. 162 (D.D.C. 1983). A copy of the District Court opinion, together with a supplemental order, is printed in the Appendix at F.1-G.1.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 1, 1983. A timely petition for rehearing and suggestion for rehearing

en banc was denied on September 26, 1983, and this petition for certiorari was filed within 60 days of that date. Copies of the orders denying rehearing and rehearing *en banc* are reprinted in the Appendix at C.1 - D.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Article I, § 5, Cl. 2:

> "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."

Article I, § 6, Cl. 1:

> ". . .for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place."

United States Code, Title 28:

§ 1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Petitioner, George Vernon Hansen, is a United States Congressman representing the Second District of the State of

Idaho. On April 7, 1983, a federal grand jury in the District of Columbia returned an indictment against Congressman Hansen charging him with four counts of violating 18 U.S.C. § 1001, the federal false statements statute. Each of the counts is based upon the filing by Congressman Hansen of annual financial disclosure statements with the Clerk of the House of Representatives and the House Committee on Standards of Official Conduct pursuant to the provisions of Title I of the Ethics in Government Act of 1978, 2 U.S.C. § 701 *et seq.* (hereinafter "EIGA"), and Rule XLIV of the House of Representatives. Specifically, the indictment charges Petitioner with the failure to report on his EIGA financial disclosure statements filed in the years 1979, 1980 and 1981 certain of his wife's loan transactions and commodity future profits, and failure to report certain other loan transactions on his EIGA statement filed in 1982.

Congressman Hansen filed with the District Court a motion to dismiss the indictment based upon the following three grounds:

(1) That his financial disclosure statements filed with the House Clerk and Committee on Standards of Official Conduct constitute an integral part of the communicative process by which he participates in the discharge by the House of Representatives of its textually based Constitutional responsibility to supervise and discipline the conduct of its Members and as such are shielded from judicial scrutiny under the Speech or Debate Clause;[1]

(2) that the financial disclosure requirements of the Ethics in Government Act are not subject to criminal sanctions under 18 U.S.C. § 1001 because Congress intended, as clearly

---

[1] This was the reasoning applied in *United States* v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980), where the court held that, under the Speech or Debate test set forth by this Court in *Gravel* v. *United States*, 408 U.S. 606, 625 (1972), the testimony of a Congressman on matters relating to his non-legislative conduct given in front of the House Ethics Committee was protected by the Speech or Debate Clause because of its direct relation to the discharge by the House of its disciplinary authority under the Constitution.

evidenced in the Act's legislative history, that they be enforced exclusively by administrative and civil measures;[2] and

(3) that the indictment, which is the first enforcement action of any kind taken by the Department of Justice for alleged violations of the Ethics in Government Act, constitutes a selective prosecution that violates the Fifth Amendment right to equal protection of Petitioner, a Congressman stridently critical of the actions of many Executive agencies, including the Department of Justice and the Internal Revenue Service.

On June 13, 1983, the District Court issued a memorandum opinion and order denying the Congressman's motion to dismiss the indictment. The District Court also ordered the continuance of the trial previously set for June 20, 1983 pending the outcome of the review by the Court of Appeals of the Congressman's Speech or Debate claim under the rule of *Helstoski* v. *Meanor*, 442 U.S. 500 (1979). F.21-22. At the same time the District Court strongly suggested to the Court of Appeals the appropriateness and desirability of immediate review of the Congressman's other legal defenses based upon considerations of judicial efficiency and upon the rule of interlocutory appealability established by the Second Circuit in *United States* v. *Myers*, 635 F.2d 932, 935-36 (2d Cir.) (pretrial appeal) (Newman, J.), *cert. denied* 449 U.S. 956 (1980). *Id.*

With respect to the appealability of the Congressman's arguments for dismissal based on grounds other than the Speech or Debate Clause, the District Court made the following observations: "It is this Court's respectful view that as the Speech or Debate Clause issue is immediately appealable, it would be

---

[2] Criminal penalties in the earlier versions of EIGA were deleted from the Act as passed. After the deletion, the conduct previously covered by the criminal penalties, *i.e.* knowing and willful falsification or failure to report material information on EIGA financial disclosure reports, were covered by a strengthened civil penalty. The deletion of the criminal sanctions was characterized during the House debates on the bill as one of the major compromises necessary to secure passage of the Act in the House and there were repeated statements by Members on the floor of the House clearly indicating a Congressional understanding that the deletion was intended to make the civil sanction exclusive. The deletion was not mentioned in the conference report on the Act.

more efficient for the Court of Appeals to consider the other two issues raised in the motion to dismiss at the same time." F.21. The District Court went on to state in a supplemental order: "It is the view of this Court that all matters addressed in the Memorandum Opinion should be immediately appealable—including the two arguments in favor of dismissal other than that based upon the Speech or Debate Clause—either under the rule suggested by the Second Circuit in *United States* v. *Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) or under general considerations of judicial efficiency." G.1.

Congressman Hansen filed a notice of appeal from the District Court's decision denying his motion to dismiss the indictment on June 23, 1983 and pursued his appeal in the United States Court of Appeals for the District of Columbia Circuit. On August 1, 1983, a division of the Court of Appeals, upon motion by the Government, summarily affirmed the District Court's denial of the Congressman's motion to dismiss the indictment on Speech or Debate Clause grounds. A.1. In the same order the division, also on motion by the Government and notwithstanding the suggestion of the District Court of the appropriateness and desirability of immediate appellate review and the clear Second Circuit precedent providing for such review, dismissed for lack of appellate jurisdiction the Congressman's appeal from the denial of his motion to dismiss the indictment on the other, non-constitutional grounds of: (1) the preemption of criminal penalties for reporting violations under EIGA; and (2) selective prosecution. A.1. In dismissing the non-constitutional portion of the appeal, the Court of Appeals relied upon the statutory final judgment rule embodied in 28 U.S.C. § 1291 and, in an apparent effort to avoid the precedential effect of the contrary decision by the Second Circuit in *United States* v. *Myers, supra*, cited as "binding" precedent *United States* v. *Carney*, 665 F.2d 1064 (D.C. Cir. 1981) and *United States* v. *Brizendine*, 659 F.2d 215, 218 (D.C. Cir. 1981). A.1.

The Court of Appeals directed in its order that the mandate would issue seven days after the disposition of any timely motion for rehearing. On August 17, 1983, the Government filed a motion asking the Court of Appeals for the immediate issuance of the mandate, basing its motion upon the societal interest in a speedy trial recognized in *United States* v.

Brizendine, supra. The Congressman opposed that motion stating his intention to file a petition for rehearing and suggestion for rehearing *en banc*. The Congressman argued in his opposition that none of the factors identified in *Brizendine* as underlying society's interest in a speedy trial were present here, and that the rights he sought to protect in his petition for rehearing would be irretrievably lost if the mandate were to issue and he was forced to trial before his claims received full and final review. On September 6, 1983, the Court of Appeals issued an order refusing the Government's request for the immediate issuance of the mandate. B.1.

On September 6, 1983, the Congressman filed with the Court of Appeals a Petition for Rehearing and Suggestion for Rehearing *En Banc* raising the same issues advanced in this application for certiorari. On September 26, 1983, the Court of Appeals issued two orders denying the Petition for Rehearing and Suggestion for Rehearing *En Banc*. C.1-D.1. Immediately thereafter, the Congressman filed a motion requesting that the Court of Appeals stay the mandate of its August 1, 1983 judgment and order pending the disposition of his application to this Court for a writ of certiorari. The motion was opposed by the Government. On October 11, 1983, the Court of Appeals granted the Congressman's motion to stay the mandate until this Court has ruled upon this petition for certiorari. E.1.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS DISMISSING THE CONGRESSMAN'S APPEAL RELATING TO CLAIMS BASED ON GROUNDS OTHER THAN THE SPEECH OR DEBATE CLAUSE CREATES A CONFLICT IN THE CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL APPELLATE JURISDICTION WHICH IMPLICATES THE FUNCTIONING OF OUR REPRESENTATIVE FORM OF GOVERNMENT

In *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), this Court created an exception to the statutory final judgment rule set

forth in 28 U.S.C. § 1291 by holding that a Member of Congress is entitled to appeal, in advance of trial, the denial of a motion to dismiss an indictment based upon a claim of a violation of the Speech or Debate Clause. The Court concluded that the Speech or Debate Clause provides the kind of protection that should be vindicated by preventing a trial, rather than setting aside its outcome. The right to pre-trial appeal in criminal cases has similarly been recognized for defenses raised by Congressmen and members of the judiciary based upon the violation of the general principle of separation of powers. *United States* v. *Myers*, 635 F.2d. 932, 935-36 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980); *United States* v. *Hastings*, 681 F.2d 706, 709 (11th Cir. 1982).

The D.C. Circuit panel has here held that an indicted Congressman's right to pre-trial appeal is strictly limited to claims challenging the indictment based upon the Speech or Debate Clause. The order of the Court of Appeals dismissing the non-Speech or Debate portion of Congressman Hansen's appeal for lack of appellate jurisdiction is in direct conflict with the decision of the Second Circuit in *United States* v. *Myers, supra*. In *Myers* the Second Circuit held that interlocutory review is available to Members of Congress in criminal cases not only for claims based upon the Speech or Debate Clause and general separation of powers principles, but also for any legal claim determinable on the face of the indictment which would, if upheld, prevent their trial on a pending indictment.

The *Myers* court viewed this right of Members of Congress to interlocutory appeal of other, non-constitutional legal claims as an essential part of the "vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressman." *Id.* at 935-36. The court in *Myers* based its recognition of this right of indicted Members of Congress upon the following observations:

> Indeed, it would not be too extravagant to suggest that a Member of Congress should be entitled to

pre-trial review of the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment. Though every member of the public has an interest in avoiding the strain, expense, and injury to reputation resulting from a trial on criminal charges even if the ultimate outcome, at trial or on appeal, will be favorable, the interests of Members of Congress in this regard are especially compelling. Their ultimate vindication in an appeal after conviction will come long after serious, perhaps irreparable, political damage has been inflicted. Moreover, though the distress and distraction of a trial many [sic] prove burdensome to many ordinary defendants with adverse consequences for others in family, employment, or other relationships with them, the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably impaired. In the case of a Congressman, he is their sole voice and vote in the House of Representatives. Finally, the case for pre-trial review of legal defenses is bolstered by the same concerns that underlie the Speech or Debate Clause. The primary purpose for the appearance of that Clause in the Constitution was "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson*, 383 U.S. 169, 181, 86 S.Ct. 749, 755, 15 L.Ed.2d 681 (1966). The opportunity for intimidation by the prosecutors of the Executive Branch would be reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before any trial has occurred.

Against these weighty concerns is only the traditional interest in judicial efficiency that normally precludes piecemeal appeals. *See Di Bella* v. *United States*, 369 U.S. 121, 82 S.Ct. 654, 1 L.Ed.2d 614 (1962); *Catlin* v. *United States*, 324 U.S. 229, 233-34,

> 65 S.Ct. 631, 633-34, 89 L.Ed.2d 911 (1945); *Cobbledick* v. *United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940). That is a significant consideration in the general run of criminal litigation, but not very persuasive as to the extremely small class of criminal cases brought against Members of Congress. Moreover, it seems likely that when such cases arise, many of them, after *Helstoski* v. *Meanor, supra*, will precipitate pre-trial appeals grounded on the Speech or Debate Clause. Without questioning the general unavailability of pendent appellate jurisdiction, *see Abney* v. *United States, supra*, 431 U.S. at 663, 97 S.Ct. at 2042, we simply note that little would be lost in the way of judicial efficiency if pre-trial appeals by indicted Members of Congress were to include all legal defenses.
>
> We need not determine the full extent of pre-trial appellate jurisdiction in such cases. The claims of Congressman Myers are, with one exception, all grounded on either the Speech or Debate Clause or the doctrine of separation of powers, as to which appellate jurisdiction is governed by or follows from *Helstoski* v. *Meanor, supra*. The one exception is the claim that the indictment fails to state an offense under 18 U.S.C. § 201 because of the Government's role and the fictitious nature of the scheme in connection with which the offense was allegedly committed. We have concluded that it is appropriate to accept pre-trial appellate jurisdiction of this claim, determinable from the face of the indictment, along with the other issues.

United States v. *Myers*, 635 F.2d at 936.

The court in *Myers* went on to review the merits not only of the statutory claim of Congressman Myers that the indictment had failed to state an offense under 18 U.S.C. § 201, but also several procedural defenses raised by the Congressman, including the defense of selective prosecution. *Id.* at 940-42. These are precisely the same types of claims advanced by Congressman Hansen here which the Court of Appeals has refused

to review on the ground that it lacks appellate jurisdiction to do so.

This conflict in the Circuits, if allowed to stand, permits the anomolous result of the scope of a Congressman's pre-trial appeal rights in a federal criminal case differing substantially depending on the judicial district in which the Executive Branch has chosen to bring the prosecution. It is a conflict that requires the attention and resolution of this Court and justifies the grant of certiorari.

The conflict involves an important question of federal appellate jurisdiction concerning the appealability or finality of a particular type of lower court order. Federal appellate jurisdiction is an area over which this Court has primary supervisory responsibility in order to ensure the proper functioning of the federal judiciary. In fact, it may very well be that the D.C. Circuit's refusal to follow the rule of interlocutory appealability established in *Myers* stems from its previously expressed reluctance to change the scope of appellate jurisdiction without the specific sanction of this Court. *See United States* v. *Brizendine*, 659 F.2d at 226. ("Far-reaching changes in a long-standing rule of appellate procedure are properly the province of Congress and the Supreme Court.") At the same time, the willingness of the Court of Appeals to stay the mandate pending the disposition of this application for certiorari obviously reflects its belief that an important question of federal appellate procedure has been raised here, one it regards as beyond its power to resolve.

This jurisdictional question is extraordinarily important because its resolution determines the pre-trial appeal rights of our national legislators subject to federal criminal prosecutions. The scope of those rights in turn determines an indicted Congressman's ability to represent, as their sole voice and vote in Congress, the hundreds of thousands of constituents in his District. The Circuit conflict here therefore directly and significantly affects the rights of a large segment of the public in the context of the functioning of our representative form of government.

The adverse effect on these democratic rights of the jurisdictional limitation imposed by the Court of Appeals is

substantial. Should Congressman Hansen be forced to sit through several weeks of trial on this indictment, he will, during the course of the trial, necessarily be forced to forego many legislative debates in the House and, more significantly, will be entirely precluded from voting on whatever legislation may be brought to the floor of the House, as well as from voting on matters before the Standing House Committees and Subcommittees of which he is a member. Many of the legislative issues on which Congressman Hansen will be unable to debate and vote will undoubtedly be issues on which the voters who sent him to Congress intensely wish representation. Moreover, because Congressman Hansen's District covers a large, sparcely populated geographic area, the interests he represents are extremely diverse, covering rural, urban, industrial and farm areas, with concerns that touch virtually every area of the federal establishment. There are therefore few votes in Congress that do not affect some substantial constituent group in his District. And insofar as many of the legislative issues advanced before Congress by this Administration have involved extremely close votes in the House of Representatives, the loss of Congressman Hansen's vote during the weeks he spends in trial cannot be said to be inconsequential to the voters of the Second District of Idaho, if indeed it could ever be said to be inconsequential.

The simple fact of the matter is that while motions and appeals are pending in his case, a Congressman is free to continue his work in Congress relatively unimpaired and will be present in the House for votes that are important to his constituents. In contrast, while he is in trial, a Congressman is completely barred from voting in the House or otherwise fully representing his constituents in Congress. Moreover, substantial interference with a Congressman's work in Congress is also likely to result from the distraction of the tremendous time demands and financial drain resulting from the extensive preparation during the weeks before trial necessary for the presentation of a full defense. Added to this distraction is the substantial psychological and physical drain always involved in the preparation for and endurance of a major criminal trial, particularly one involving the extensive press coverage that follows when the defendant is a political figure.

Yet, should Congressman Hansen be forced to trial and be convicted, and should his conviction later be invalidated by the Court of Appeals or by this Court on the ground of a non-constitutional legal defense that could have readily been disposed of prior to trial, this substantial impairment of the right of the voters of the Second District of Idaho to be "fully and fearlessly represented" in Congress will have been totally unnecessary. Such an irretrievable loss of the right to representation of more than half a million American citizens can only be avoided by preventing a trial where possible through interlocutory review, rather than setting aside the trial's outcome. *Helstoski* v. *Meanor*, 442 U.S. at 508; *Abney* v. *United States*, 431 U.S. 651, 662 (1977).

These are the very same policy concerns underlying the immediate appealability of claims based upon the Speech or Debate Clause and the doctrine of separation of powers. Allowing interlocutory appellate review of non-constitutional claims by an indicted Congressman that may avert trial is not, as the Government argued to the Court of Appeals, the arbitrary conferral of privilege upon legislators. As in the case of constitutional claims, a Congressman's right to immediate appeal of other legal defenses arises from a concern not for the Congressman individually, but for the right of the people he represents to full, unimpaired representation in Congress. *See Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881) ("These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.").

The Congressman's pursuit of this issue here is not an academic exercise or a dilatory tactic. His other legal claims here are substantial, particularly the one concerning the preemption of criminal sanctions for reporting violations under the Ethics in Government Act, an important statutory issue affecting thousands of high level federal employees in all three Branches of government. The review of these issues on appeal before trial may well lead to the dismissal of the indictment.

Because this jurisdictional question implicates the functioning of our representative form of government it is of

considerable importance and requires uniformity throughout the Circuits. Moreover, since the District of Columbia is the seat of our national government, it is likely that many, if not most, prosecutions of Members of Congress will take place here. The D.C. Circuit's current restrictive view of pre-trial appeals is therefore likely to govern the manner in which most criminal prosecutions of Members of Congress will proceed, and consequently, will determine the degree of interference such prosecutions will have with the right of the affected constituents to full representation in Congress. The continuing recurrence of this important question in the D.C. Circuit therefore requires that the exact scope of the pre-trial appeal rights of indicted Members of Congress be directly considered and resolved by this Court.

The need for review by this Court is all the more compelling since the correctness of the decision of the Court of Appeals is open to serious question. A careful examination of the cases upon which the Court of Appeals relied in dismissing the Congressman's appeal clearly indicates that the policy considerations underlying the final judgment rule which led to the dismissal of the interlocutory appeals in those cases are not present here.

Unlike the claims held unappealable in *United States* v. *Carney*, 665 F.2d at 1065, the other legal claims of Congressman Hansen can be readily resolved before trial by the Court of Appeals and, if upheld, *will prevent his trial* upon the pending indictment. The claims dismissed from the appeal in *Carney*, concerning the denial of motions to suppress evidence and to permit inspection of the grand jury minutes, would not, if upheld, have necessarily precluded trial of the Congressman there on the charges in the indictment. This distinction between claims that would merely suppress evidence and those that would preclude trial on the charge has been recognized as a controlling factor in formulating exceptions to the final judgment rule. *See United States* v. *Brizendine*, 659 F.2d at 224 n. 16.

The claim held unappealable in *United States* v. *Brizendine*, *supra*, related to alleged prosecutorial vindictiveness and misconduct in the course of plea bargaining. That claim is also dis-

tinguishable from the other legal claims made by Congressman Hansen. The finality rule policy considerations which led the Court to dismiss the interlocutory appeal in *Brizendine* are not present here.

The first policy consideration identified in *Brizendine* was based on an observation in *United States* v. *MacDonald*, 435 U.S. 850 (1978), wherein this Court rejected the availability of interlocutory appeal of a claim of the violation of the right to a speedy trial. The Court in *MacDonald* noted that there was "nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim." *Id.* at 861; *United States* v. *Brizendine*, 659 F.2d at 224. Similarly, the due process claim in *Brizendine* was such that were its immediate appeal allowed, it "would open the door to interlocutory appeals in a high proportion of criminal cases." *Id.* This concern for opening the floodgates of interlocutory appellate litigation in criminal prosecutions simply is not present here. The pre-trial appeal right claimed by Petitioner is inherently limited to Members of Congress, and, as noted by the Second Circuit in *Myers*, in permitting such a right "little would be lost in the way of judicial efficiency" because of the "extremely small" number of criminal cases against Congressmen. *United States* v. *Myers*, 635 F.2d at 936.

The second policy consideration identified in *Brizendine* was that the issues raised by the defendants' claim there would, because the facts were in dispute between the parties, "be complex and difficult to determine on appeal," requiring a full examination of the evidentiary record by the court of appeals. *United States* v. *Brizendine*, 659 F.2d at 225. This was contrasted to issues raised by claims subject to immediate appealability which do not rest on controverted factual assertions and require only a "simple legal determination by the appellate court." *Id.* Unlike the claim in *Brizendine*, Congressman Hansen's other legal defenses do not rest on controverted factual assertions. They require only straightforward legal determinations. This is particularly true of the Congressman's claim that the Ethics in Government Act, by virtue of its legislative history, preempts or precludes the application of any criminal sanctions for reporting violations under the Act, an issue of statutory construction that may be readily resolved by an appellate court.

The third policy consideration identified in *Brizendine* was that allowing interlocutory appeals based on the claim asserted there would chill the plea bargaining process, a process which is regarded as an important component of this country's criminal justice system. *Id.* In contrast, as noted in *Myers*, permitting the immediate appeal of Congressman Hansen's other legal defenses would in fact promote an important separation of powers policy underlying the Speech or Debate Clause, *i.e.* preventing intimidation of Members of Congress by the Executive by letting prosecutors know "that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before any trial has occurred." *United States* v. *Myers*, 635 F.2d at 936. The policies of the Speech or Debate Clause to protect and promote full and fearless representation by our elective representatives in Congress have been recognized by this Court as being "vitally important to our system of government and therefore are entitled to be treated by the courts with the sensitivity that such important values require." *Helstoski* v. *Meanor*, 442 U.S. at 506. The rule of interlocutory appeal established in *Myers* reflects such a sensitivity.

A final policy concern identified in *Brizendine* was that of preserving ". . .the deference appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial," and avoiding undermining that independence of the trial judge through piecemeal appeal. *United States* v. *Brizendine*, 659 F.2d at 219 n. 3, *citing Firestone Tire and Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981). This concern is completely absent here. Upon denying Congressman Hansen's motion to dismiss the indictment, the trial judge voluntarily stayed the trial pending the outcome of his interlocutory appeal and went so far as to urge the Court of Appeals to review all matters addressed in her decision. F.21-22; G.1. The trial judge has in effect certified all the issues to the Court of Appeals for pre-trial review. Having done so, there is no danger of the trial judge perceiving that her independence is being undermined by the pre-trial review of all aspects of her decision.

The August 1, 1983 order of the Court of Appeals dismissing the non-Speech or Debate portion of Congressman Hansen's appeal both fails to account for the compelling policy

reasons supporting the immediate appealability of his other legal defenses and fails to recognize the complete absence here of the policy considerations underlying the final judgment rule. The balance of the competing policy concerns here tips decisively in favor of allowing pre-trial review of the Congressman's other, non-constitutional claims under a rule of interlocutory appeal that constitutes the natural reach of what the court in *Brizendine* termed the "penumbra" of *Helstoski* v. *Meanor, supra. United States* v. *Brizendine*, 659 F.2d at 224.[3]

II. BECAUSE THE EXECUTIVE BRANCH IS NOW ATTEMPTING TO USE EIGA REPORTS AS A BASIS FOR PROSECUTING MEMBERS OF CONGRESS, THIS COURT MUST DETERMINE WHETHER THE FILING OF THOSE REPORTS WITH THE HOUSE OF REPRESENTATIVES CONSTITUTES AN ACTIVITY BY CONGRESSMEN PROTECTED BY THE SPEECH OR DEBATE CLAUSE

In its August 1, 1983 order, the Court of Appeals summarily affirmed the District Court's denial of Congressman Hansen's motion to dismiss the indictment on Speech or Debate Clause grounds for the reasons stated in the District Court's memorandum opinion. A.1. In concluding that the Speech or Debate Clause did not prohibit the prosecution of Petitioner on the

---

[3] As recognized by the District Court, given its jurisdiction over the Congressman's Speech or Debate claim, the Court of Appeals could also have reviewed his other claims by exercising its discretion to do so based upon considerations of judicial efficiency. *See e.g. Scarlett* v. *Seaboard Coast Line R. Co.*, 676 F.2d 1043, 1052 (5th Cir. 1982) ("Whether or not the precise order [herein] is independently reviewable, the court of appeals may, in the interest of orderly judicial administration, review matters beyond that which supplies appellate jurisdiction."); *see also Benford* v. *American Broadcasting Companies, Inc.*, No. 81-1200 (4th Cir. June 17, 1981) (unpublished opinion) (non-Speech or Debate ground for dismissal of complaint against congressional defendants reviewed as an incidental exercise of the court's appellate jurisdiction over their Speech or Debate claim). Of course, it is Petitioner's position that he is entitled to appeal the denial of his other defenses here as a matter of right, and need not rely on judicial discretion in order to do so.

basis of his filing EIGA reports with the House of Representatives, the District Court placed heavy reliance on *United States* v. *Myers*, 692 F.2d 823, 849 (2d Cir. 1982) (post-trial appeal), *cert. denied*, 103 S.Ct. 2437, 2438 (1983) (hereinafter referred to as "*Myers II*"). F.13-15.

In *Myers II*, the Second Circuit ruled that EIGA reports are not protected by the Speech or Debate Clause and that an EIGA report was properly admitted as evidence in a bribery case against Representative Lederer, one of the "Abscam" defendants. After the decision in *Myers II*, Representative Lederer petitioned this Court for a writ of certiorari. One of the six issues he raised in his petition was the propriety of the prosecution's use of his EIGA report in light of the Speech or Debate Clause. On May 31, 1983, this Court denied Lederer's petition for certiorari, along with those of several other Abscam defendants. *Id.*

Nevertheless, here the question of Speech or Debate protection for EIGA reports filed by Members of Congress is cast in an entirely different light. In the Lederer case that question was merely one issue of many addressed by this Court and the Second Circuit in a bribery case involving overwhelming evidence of guilt. Thus, while the Second Circuit may have decided the issue incorrectly in *Myers II*, the issue did not arise in a context that made it sufficiently important to warrant review by this Court.

More significantly, there is a critical distinction between this case and that of Lederer. The Speech or Debate question raised by Lederer concerned only the issue of the admissibility of an EIGA financial disclosure statement of a Member of Congress as one piece of evidence in an unrelated bribery trial. Here, the EIGA statements of Congressman Hansen form the very basis of the criminal prosecution brought by the Executive Branch. As stated by this Court in *United States* v. *Johnson*, 383 U.S. 169, 181-82 (1966), the "predominant thrust" of the Speech or Debate Clause is to protect against "the instigation of criminal charges" against Members of Congress in order to "prevent intimidation by the executive and accountability before a possibly hostile judiciary." This case involves an attempt by the Executive to expose Members of Congress to a whole new

area of criminal liability. The central policy concerns underlying the Speech or Debate Clause are therefore much more directly implicated here. Since the policies underlying the Speech or Debate Clause are "vitally important to our system of government," *Helstoski* v. *Meanor*, 442 U.S. at 506, their direct and substantial implication here requires that the question of the availability of EIGA reports as a basis for prosecuting Members of Congress be considered and resolved by this Court.

The *Myers II* Speech or Debate holding, relied upon by the District Court, incorrectly applied the Speech or Debate test articulated by this Court in *Gravel* v. *United States*, 408 U.S. 606 (1972). The court in *Myers II*, concluded that since the content of EIGA reports filed by Congressmen do not relate to legislative activity, the reports are not shielded by the Speech or Debate Clause. Specifically, the Court reasoned that "[d]isclosure of income from sources other than employment by the United States, *see* 2 U.S.C. § 702(a)(1)(A), is not part of [the] 'deliberative and communicative processes'" by which Members participate in House proceedings. *United States* v. *Myers*, 692 F.2d at 849, *quoting Gravel* v. *United States, supra.*

However, as clearly indicated by this Court in *Gravel*, it is not the *content* of a communication by a Member to the House that determines its Speech or Debate status, but rather its *function*, or relationship to particular types of House business.

In *Gravel*, the Court set forth the following criteria for Speech or Debate protection:

> [the Clause protects acts that are] an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. at 625. The regulation and discipline of the conduct of Members of Congress is one of the "other matters," aside from the development of legislation, explicitly placed by the Constitution within the jurisdiction of the House. U.S. Const. art. I, §5, cl. 2. The communication of financial information by

Congressmen in EIGA reports to the House Committee on Standards of Official Conduct constitutes an integral part of this House disciplinary process. In fact, the Government has conceded that this is the function EIGA reports serve.[4]

Accordingly, under the test established in *Gravel*, since the EIGA financial disclosure reports filed by Members of Congress constitute an integral part of the participation by Members in the discharge of Congressional disciplinary authority specifically placed by the Constitution within the jurisdiction of the House, they are protected by the Speech of Debate Clause.

A similar conclusion was reached in *United States* v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980), where the court held that a Congressman's testimony in front of the House Ethics Committee was protected by the Speech or Debate Clause because of its direct relation to the discharge by the House of its disciplinary authority under the Constitution. (The House Ethics Committee was the precursor of the current House Committee on Standards of Official Conduct.) The court in *Eilberg* recognized the critical distinction between the *content* and *function* of communications by Congressmen in determining their status as legislative acts entitled to Speech or Debate protection:

---

[4] In its Opposition to a motion filed with the District Court by the Clerk of the House to quash, on Speech or Debate Clause grounds, a Government subpoena *duces tecum* seeking the production by the Clerk at trial of the original EIGA reports filed by Congressman Hansen, the Government argued that EIGA reports are material to a matter within the "jurisdiction" of Congress, as that term is used in 18 U.S.C. §1001, by stating: "It is clear that false reports submitted by a Congressman have 'the capacity of influencing' the [disciplinary] work of the Standards Committee and thus the Congress." Government Opposition to Clerk's Motion to Quash at 7.

The Clerk's motion to quash also sought protective relief with respect to testimony the Government expects to subpoena from the Chief of Staff of the Committee on Standards of Official Conduct. The Clerk's motion was eventually denied without prejudice as moot by the District Court in light of the fact that the trial was continued pending the outcome of the Congressmen's appeal from the District Court's denial of his motion to dismiss the indictment.

> It might be argued that, since the testimony of the defendant before the Ethics Committee related to 18 U.S.C. § 203, such testimony is beyond the scope of legislative activity and is not protected by the Speech or Debate Clause. The Committee, however, was engaged in the very function the Speech or Debate Clause protects—the right of Congress to preserve its independence by disciplining its own members. This right to discipline is one of the matters "which the Constitution places within the jurisdiction of either House." *Gravel, supra*, 408 U.S. at 626, 92 S.Ct. at 2627. Therefore, we find that defendant's testimony before the Ethics Committee is protected by the Speech or Debate Clause.

Id. at 1083. *See also Ray* v. *Proxmire*, 581 F.2d 998, 1000 (D.C. Cir. 1978) (letter by Senator Proxmire to Chairman of Senate Ethics Committee in response to inquiry by the Committee Chairman about the Senator's non-legislative conduct held protected by the Speech or Debate Clause.)

Contrary to the District Court's conclusion, there is no distinction between a Congressman's act of communicating information to the House Committee on Standards of Official Conduct in his EIGA reports and the testimony of Congressman Eilberg in front of the Ethics Committee. Both acts have the same function of assisting the House in discharging its disciplinary responsibility under the Constitution and are therefore protected under the Speech or Debate Clause. Accordingly, a Member's falsification of his EIGA financial disclosure statements filed with the Committee on Standards of Official Conduct cannot be made the basis for a prosecution under 18 U.S.C. § 1001 any more than false testimony by Congressman Eilberg could have been made the basis of his prosecution under the federal bribery statute.

It is this direct involvement with the discharge of Congressional disciplinary authority that distinguishes EIGA reports from the statements or communications made by the Congressmen in the cases relied upon in *Myers II*. The *Myers II* court supported its Speech or Debate ruling by citing cases brought

by the Government against Members of Congress based upon their submission of statements to the House Clerk's office relating to the disbursement of House funds, including *United States ex rel. Hollander* v. *Clay*, 420 F. Supp. 853 (D.D.C. 1976) (False Claims Act case based upon travel vouchers submitted to the Clerk's Office for reimbursement), *United States* v. *Bramblett*, 348 U.S. 503 (1955) (§ 1001 prosecution based upon statement to House Disbursing Office concerning staff compensation), and *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979) (§ 1001 prosecution based upon statement to House Office of Finance). However, the statements by the Congressmen in those cases did not have any function relating directly or indirectly to the House disciplinary authority or to any other uniquely legislative activity of Congress.

Before the Executive Branch may be allowed to proceed with criminal prosecutions against Members of Congress based upon their filing of financial statements with the House of Representatives, reports required both by House Rule XLIV and a statute passed pursuant to the power of Congress to regulate and discipline the conduct of its Members, this Court must determine whether those filings are protected by the Speech or Debate Clause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Frank A. S. Campbell
William Stoll Hemsley, Jr.
HEMSLEY & CAMPBELL
1111 Nineteenth Street, N.W.
Suite 301
Washington, D.C. 20036
(202) 659-0550
Counsel for Petitioner

November 2, 1983

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 1983, three copies of the foregoing Petition for Writ of Certiorari were mailed, first class, postage prepaid to the Solicitor General of the United States, United States Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

William Stoll Hemsley, Jr.
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1689 September Term 1982
Criminal No. 83-11175-01 [*sic*]

United States of America

v.

George Vernon Hansen,
Appellant

Before: *Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

Upon consideration of appellee's motion for summary affirmance and dismissal for lack of appellate jurisdiction and the response and reply thereto, it is

ORDERED by the Court that the motion is granted. The district court's ruling denying appellant's motion to dismiss the indictment on speech or debate clause grounds is affirmed for the reasons stated in the district court's June 13, 1983 Memorandum Opinion. It is

FURTHER ORDERED by the Court that the appeal from the district court's denial of appellant's motion to dismiss the indictment is in all other respects dismissed. The further rulings appellant seeks to challenge immediately are not final decisions, *see* 28 U.S.C. § 1291, and do not fit within any exception to the finality requirement recognized in precedent binding upon this court. *See United States* v. *Carney*, 665 F.2d 1064 (D.C. Cir. 1981); *United States* v. *Brizendene* [*sic*], 659 F.2d 215, 218 (D.C. Cir. 1981).

It is FURTHER ORDERED by the Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on June 15, 1982.

Per Curiam

FILED AUG 1 1983

*Circuit Judge Mikva did not participate in the foregoing Order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1689 — September Term 1983
Criminal No. 83-00075-01

United States of America

v.

George Vernon Hansen,
Appellant

Before: Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

On consideration of the motion of Appellee for immediate issuance of the mandate and of the opposition thereto, it is

ORDERED by the Court that Appellee's aforesaid motion is denied.

For The Court:

GEORGE A. FISHER,
CLERK

By:
/s/
Robert A. Bonner
Chief Deputy Clerk

FILED SEP 6 1983

Circuit Judge Mikva did not participate in this Order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1689 **September Term 1983**
Criminal No. 83-00075-01

United States of America

v.

George Vernon Hansen,
Appellant

Before: Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

On consideration of the Petition for Rehearing of appellant, George Vernon Hansen, filed September 8, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For The Court

GEORGE A. FISHER,
CLERK

By:
/s/
Daniel M. Cathey
First Deputy Clerk

FILED SEP 26 1983

Circuit Judge Mikva did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1689 **September Term 1983**
Criminal No. 83-00075-01

United States of America

v.

George Vernon Hansen,
Appellant

Before: Robinson, Chief Judge, Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, and Scalia, Circuit Judges

ORDER

The Suggestion for Rehearing *en banc* of appellant, George Vernon Hansen, filed September 8, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For The Court

GEORGE A. FISHER,
CLERK

By:
/s/
Daniel M. Cathey
First Deputy Clerk

FILED SEP 26 1983

Circuit Judges Wald and Mikva did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 83-1689 **September Term 1983**
Criminal No. 83-00075-01

United States of America

v.

George Vernon Hansen,
Appellant

Before: Mikva, Edwards and Ginsburg, Circuit Judges

ORDER

On consideration of Appellant's Petition for a Stay of Mandate Pending Disposition of Application for Certiorari and of the opposition thereto, it is

ORDERED by the Court that Appellant's foresaid motion is granted and the Clerk is directed to withhold issuance of the mandate to and including November 2, 1983.

Per Curiam

For The Court:

GEORGE A. FISHER,
CLERK

By:
/s/
Robert A. Bonner
Chief Deputy Clerk

FILED OCT 11 1983

Circuit Judge Mikva did not participate in this Order.

The UNITED STATES of America

v.

George Vernon HANSEN, *Defendant*.

Crim. No. 83-00075.

United States District Court,
District of Columbia,

June 13, 1983.

As Amended June 17, 1983.

Reid H. Weingarten, James M. Cole, Public Integrity Section, Crim. Div., U.S. Dept. of Justice, Washington, D.C., for plaintiff.

Frank A.S. Campbell, William S. Hemsley, Jr., Roy M. Cohn, Washington, D.C., for defendant.

MEMORANDUM OPINION

JOYCE HENS GREEN, District Judge.

This matter is before the Court upon defendant's motion to dismiss the indictment in which he is charged with four counts of making false statements in documents within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. § 1001. Defendant is alleged to have made false statements concerning his financial status on the financial disclosure reports he was required to file with the United States House of Representatives in 1978, 1979, 1980, and 1981 pursuant to the Ethics in Government Act of 1978 (EIGA), 2 U.S.C. §§ 701-09. Defendant is a United States Congressman representing the second district of the State of Idaho. Defendant makes three arguments in support of his motion to dismiss: (1) that the financial disclosure requirements of EIGA are not subject to criminal sanctions under 18 U.S.C. § 1001 because Congress intended that they be enforced only by civil measures, (2) that the Speech or Debate Clause of the Constitution

protects him from any prosecution concerning his EIGA reports, and (3) that he is the victim of selective prosecution. Defendant also has filed a motion for leave to take discovery relevant to the selective prosecution issue. Oral argument on these questions was heard on June 3, 1983. For the reasons which follow, defendant's motions shall be denied.

I. The Applicability of Section 1001 to False Statements Within EIGA Reports

On its face, section 1001 proscribes the conduct allegedly committed by defendant. The section, which has general effect, essentially makes it a crime to knowingly and willfully falsify a material fact or knowingly and willfully make any false, fictitious or fraudulent statement in connection with "any matter within the jurisdiction of any department or agency of the United States."[1] This section embraces false statements made to the House of Representatives. *Diggs* v. *United States*, 613 F.2d 988, 999 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 982, 100 S.Ct. 2961, 64 L.Ed.2d 838 (1980). EIGA requires Members of the House of Representatives such as defendant to file with the Clerk of the House of Representatives annual reports of their personal financial status. 2 U.S.C. §§ 701-03. (Senators, non-voting representatives to Congress, and certain officers and employees of the Legislative Branch are also required to file such reports with the appropriate official.) Section 1001 has been held to prohibit the intentional concealment of material facts by a federal official in the course of completing a financial

---

[1] Section 1001 provides:

"§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

"[T]he term 'jurisdiction' should not be given a narrow or technical meaning for the purposes of § 1001." *Bryson* v. *United States*, 396 U.S. 64, 70, 90 S.Ct. 355, 359, 24 L.Ed.2d 264 (1969).

disclosure statement required by an agency of its employees before the enactment of EIGA. *United States* v. *Muntain*, 610 F.2d 964, 971 (D.C. Cir. 1979).

Defendant, however, argues that it was the intent of Congress to limit enforcement of the financial disclosure report requirements to civil sanctions set forth in EIGA at 2 U.S.C. § 706. That section allows the Attorney General to bring a civil action against anyone who knowingly and willfully falsifies any information in his report or knowingly and willfully fails to file a report.[2] A maximum penalty of $5,000 may be imposed. A provision in the first draft bills of EIGA establishing criminal sanctions for falsified disclosure reports, *see* 123 Cong. Rec. 21007 (1977), was deleted from the act as it was finally passed by both Houses of Congress. Defendant argues that the deletion of the criminal penalties demonstrates Congress' intent that no criminal sanctions should apply to the falsification of EIGA reports.

At the outset, it must be noted that EIGA contains no express repeal or preemption of section 1001 as it applies to falsified disclosure reports. The act does specify that EIGA's provisions "shall supersede and preempt any State or local law with respect to financial disclosure," 2 U.S.C. § 708, but nowhere in the act is there an equivalent provision concerning other federal laws.

Nor does anything in the text of EIGA or section 1001 establish an implicit repeal or preemption by the former of the latter as it pertains to falsified disclosure reports. Repeals

---

[2] Section 706 provides:

"§ 706. Failure to file or filing false reports.

The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information that such individual is required to report pursuant to section 702 of this title. The court in which such action is brought may assess against such individual a civil penalty in any amount not to exceed $5,000. No action may be brought under this section against any individual with respect to a report filed by such individual in calendar year 1978 pursuant to section 701(d) of this title."

by implication, of course, are disfavored. *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F.2d 783, 785 (D.C. Cir. 1971).[3] A repeal by implication may be found, however, only where there is "some manifest inconsistency or positive repugnance between the two statutes." *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 565, 83 S.Ct. 520, 525, 9 L.Ed.2d 523 (1963). Unless "the two acts are irreconcilable, clearly repugnant as to vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation," no repeal will be implied. 1A C.D. Sands, *Sutherland Statutory Construction*, § 23.10, at p. 231 (4th ed. 1972). There is no inconsistency between section 706 of EIGA and 18 U.S.C. § 1001. Section 1001 makes it a crime to knowingly

---

[3] Defendant attempts to avoid the abundant authority disfavoring repeals by implication by characterizing his theory differently: he asserts that his argument is not that section 1001 is repealed by EIGA but that it is *"inapplicable"* to it. This distinction has no substance. Defendant is arguing that a general statute which, as explained above, on its face is controlling, has no force in a particular instance. This is the type of "repeal" that the Court of Appeals said could not be executed by implication in *Committee for Nuclear Responsibility* v. *Seaborg*, 463 F.2d at 785. "To assume . . . that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it is, in effect, to accomplish a partial repeal of the general statute." *United States* v. *Burnett*, 505 F.2d 815, 816 (9th Cir. 1974), *cert. denied*, 420 U.S. 966, 95 S.Ct. 1361, 43 L.Ed.2d 445 (1975).

United States v. *DeLaurentis*, 491 F.2d 208 (2d Cir. 1974), upon which defendant relies for the proposition that a general criminal statute may be found inapplicable to conduct regulated by another statute notwithstanding its "plain meaning" is inapposite. That case concerned the use of 18 U.S.C. § 241, a criminal statute enacted in 1870 to protect the rights to newly-freed former slaves, as a basis for a prosecution for threats to interfere with activity protected by the National Labor Relations Act. The Second Circuit stated that "[a]lthough the conduct of [the defendants] may have been reprehensible, we do not believe that Congress has made it criminal," 491 F.2d at 209, and found that the victims' rights "must be vindicated exclusively through" the Labor Act. *Id.* at 211. In the instant case, by contrast, the clear purpose of section 1001 is to make a crime the making of false statements to the government in matters including, under *United States* v. *Muntain*, financial disclosure reports.

and willfully falsify or conceal a fact, make a false statement, or use a false writing knowing the writing to contain a false statement. Section 706 provides a civil enforcement mechanism for the knowing and willful falsification of an EIGA disclosure report or the knowing and willful *failure to file* such a report. Nothing in one statute compels, for example, the commission of an act prohibited by the other; rather, they proscribe the same conduct and complement each other in that the civil statute attacks the lesser offense of non-filing as well as intentional false filing.

Where two statutes concern the same subject, a court considering them must make every effort to reconcile allegedly conflicting provisions and give effect to both, so long as doing so does not deprive one or the other of its essential meaning. *Wilderness Society* v. *Morton*, 479 F.2d 842, 881 (D.C. Cir.) *cert. denied*, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1973). Here, however, the prohibitory language of the two statutes does not conflict. As a result, the only matter to "reconcile" is the availability of both civil and criminal remedies for false statements in EIGA reports. This poses no problem, inasmuch as it is established that where a single act violates more than one statute, the government may elect to prosecute under either. *United States* v. *Brown*, 482 F.2d 1359, 1360 (9th Cir. 1973), citing *United States* v. *Gilliland*, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598 (1941). In *Brown*, the Ninth Circuit ruled that, assuming the making of false statements on bid forms was a violation of either of two other false statements statutes, 18 U.S.C. § 1010 or § 1012, such conduct could also be prosecuted under the general statute, section 1001, with its harsher penalties. *Accord, United States* v. *Burnett*, 505 F.2d at 816 (government had the option of proceeding under 18 U.S.C. § 1919, concerning false statements to obtain unemployment benefits for prior federal service, or section 1001).

Defendant also argues that since section 706 does not contain a parallel provision to that in section 704 of EIGA which provides that the Attorney General's authority to bring a civil action to enforce Section 704 "shall be in addition to any other remedy available under statutory or common law,"

section 1001 may not apply to the filing of false EIGA reports. Section 704 regulates the public's accessibility to filed EIGA reports. It makes it unlawful to obtain or use an EIGA report for any unlawful purpose, for any commercial purpose (outside the news media), to determine credit ratings, and for the solicitation of money. 2 U.S.C. § 704(e)(1). The civil remedy under section 704 pertains to such proscribed uses of EIGA reports. 2 U.S.C. § 704(e)(2). The language in section 704(e)(2) preserving other remedies protects the rights of filers of EIGA reports to bring suit on any private cause of action arising from the misuse of their financial disclosure information. As there is no parallel private right with respect to the requirement in section 702 to file correct reports, there is no proper analogy between section 706 (which enforces section 702) and section 704.

Nor does section 705 of EIGA, which provides that a person who relies on an advisory opinion by the appropriate congressional committee in making his disclosure report "shall not . . . be subject to any sanction provided in this chapter," preclude the instant prosecution under section 1001. First, there is no assertion that defendant prepared the disclosure reports in question in reliance upon any such advisory opinion. Second, section 705 unambiguously limits its forgiveness provision to sanctions under EIGA and does not purport to preempt other remedies such as section 1001. 2 U.S.C. § 705(b).

The plain language of the two statutes shows no "manifest repugnance," no conflict that would indicate an implied repeal. It has been held that under such circumstances the inquiry ends at this point; that it is improper to turn to legislative history to look for a repeal by implication. *Demby* v. *Schweiker*, 671 F.2d 507, 510 (1981) (Opinion announcing judgment of the court by MacKinnon, J., with one judge concurring in the result). In any case, as explained below, an exploration of the relevant legislative history does not yield support for defendant's contention that Congress intended section 1001 not to apply to the acts he is alleged to have committed.

Because EIGA and section 1001 are not irreconcilable, there must be an affirmative showing of an intention to repeal before the Court may find the criminal provision repealed

by implication. *Izaak Walton League of America* v. *Marsh*, 655 F.2d 346, 366 (D.C. Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 630 (1981). Next to the statute itself, the conference report of a bill is the most persuasive evidence of congressional intent, since it represents the final statement of the terms agreed to by both Houses. *Demby* v. *Schweiker*, 671 F.2d at 510 (Opinion by MacKinnon, J.). However, because the conference report of S. 555 (the bill which became EIGA), 124 Cong. Rec. 35650–72 (1978), does not discuss the deletion of the previously proposed criminal provision or the applicability of other criminal sanctions to the act, *see id.* at 35668, the parties have referred only to statements of individual Representatives in the debates.

The original Senate bill (S. 555) and various House bills preceding the enactment of EIGA contained both a criminal penalty for knowing and willful falsifications and a civil penalty for misstatements. The criminal penalties were deleted and the requirements for civil sanctions were made more stringent during deliberations on the act in the House, apparently during discussions on H.R. 13850, a proposed substitute bill. In response to defendant's argument that the deletion of the criminal penalty indicates Congress' intent that no criminal sanctions apply to EIGA, the government contends that it just as logically could be argued that the criminal penalty was removed because section 1001 rendered it superfluous and that the requirements for the civil sanctions were heightened because of a concern that Members of Congress would be exposed to nuisance suits for inadvertent errors on their disclosure reports.

None of the statements in the legislative history referred to by defendant provide unequivocal support for his argument. Defendant quotes Representative Danielson who, discussing the particulars of H.R. 13850, noted that

> provisions of the bill do not provide for a criminal penalty but do provide for a civil penalty for failure to comply with the disclosure provisions.

124 Cong. Rec. 30414 (1978). This remark does not discuss the applicability of section 1001, and indeed does not specifically refer to false statements. It merely notes what sanctions

are and are not contained within EIGA itself. The statement of Representative Moorhead that the notable improvements of the substitute bill included "the deletion of *unnecessary* criminal penalties with respect to [the] financial disclosure section," 124 Cong. Rec. 30415 (1978) (emphasis added), does not compel the conclusion that Congress felt that it was unnecessary to include criminal penalties because civil sanctions would achieve the desired result. That Congressman equally could have meant that the penalties were unnecessary because of the existence of section 1001.

Likewise, Representative Schroeder's observation that "there is no specific criminal sanction for misfiling," 124 Cong. Rec. 30419 (1978), refers to the provisions of EIGA and does not speak to the *general* criminal sanction of section 1001. Her comments at 124 Cong. Rec. 30422 (1978) under the heading "Failure to File or Falsifying Reports," to the effect that under EIGA intentional violations would be prosecuted by the Attorney General under what is now section 706 and that technical or inadvertent violations should be resolved informally, similarly present nothing addressing the applicability of criminal sanctions.

The statements of Representative Preyer at 124 Cong. Rec. 30425 (1978) cited by defendant note that under the bill's compliance and enforcement provisions Members of Congress would "not be subject to any civil penalty under the act for inadvertent error or omission in the disclosure." Again, this does not address the question of whether EIGA would not be covered by other criminal sanctions but simply assures the Members of Congress that they would be protected from civil suits for minor, unintentional errors or omissions in their disclosure reports. Similarly, Representative Frenzel's remark that "now that the criminal penalties have been removed from this legislation, against my wishes, I might add, there is only a civil penalty to deter a potential nondiscloser," 124 Cong. Rec. 30430 (1978), is consistent with the applicability of section 1001 inasmuch as the criminal statute would not apply to failures to file. Nor does Representative Gonzales' comment that "it is not a criminal offense to file incorrect information," 124 Cong. Rec. 32013 (1978), suggest that

section 1001 was intended not to reach the alleged conduct at issue in the instant case: the mere filing of incorrect information does not meet the requirements for a conviction under section 1001. Representative Bauman's comment that the enforcement provision of EIGA "would have been a criminal penalty, but it was changed to get the bill through the House," 124 Cong. Rec. 30457 (1978), likewise says nothing about section 1001.

Defendant simply has failed to make the "affirmative showing" of an intent to repeal required by *Izaak Walton League*. Moreover, the only statement in the legislative history of EIGA specifically referring to section 1001 is contrary to his argument. Representative Wiggins, who, according to defendant, was the Ranking Minority Member of the Select Committee on Ethics when the legislation was being developed, had this to say in the context of the removal of the act's criminal penalty for falsified disclosure statements:

> Some Members have been concerned about their criminal liability. Well, they should be concerned about their criminal liability. I hope they have not been led to believe that by eliminating the criminal sanctions in this bill they have been relieved of vulnerability, because they have not.
>
> Title 18 contains a section 1001 which makes it a felony subject to 5 years' imprisonment to willfully and knowingly file a false document or false statement. That is general law. It continues in effect, and that will apply with respect to the statements filed here. Therefore, even though there are no explicit criminal penalties in this bill, the Members will all be subject to criminal penalties if the Attorney General elects to proceed under 18 U.S.C. 1001.

124 Cong. Rec. 30429 (1978).[4] Representative Wiggins also made reference to the applicability of general criminal statutes

---

[4] Representative Wiggins went on to present this hypothetical: "Let me give the Members a little scenario on how this is apt to apply. You file your statement, you make a good faith estimate of the

in the United States Code to EIGA during a discussion of a proposed amendment directed at Members who knowingly permit the use of House stationery for fundraising activities. 124 Cong. Rec. 30444 (1978). Representative Thompson reacted to this point by noting that Wiggins had "made a very important point" that "this does become a part of the United States Code, that it does involve a criminal penalty." *Id.*

It is clear from the Congressional Record that Representative Wiggins was a relentless opponent of financial disclosure requirements and that the Supreme Court has "often cautioned against the danger when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB* v. *Fruit and Vegetable Packers and Warehousemen*, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964). Yet Representative Wiggins' statement constitutes

---

value with respect to an asset you own. It is a good faith estimate in your own mind, but one of the persons who reads your statement is an opponent or a member of the press. He does not agree that your estimate is in fact in good faith; he thinks it is grossly understated. The press or your opponent goes to a U.S. attorney and says that he believes you have made a willfully false statement because you have significantly understated the value of an asset on your report.

"What is the position of the U.S. attorney? He has a hot potato in his hand. He has a Member of Congress who is being accused. If he pooh-poohs the allegation, he fears the publicity of cover-up, particularly if the complaint comes from the press. On the other hand, if he proceeds, he fears the problem of discrimination against a sitting Member of Congress, political manipulation, and the like.

"What does he do? Well, I will tell the Members what the typical U.S. attorney will do. He will pass the buck to the grand jury. He will in effect say, 'I am not going to decide this difficult case. He will let the grand jury make a decision.'

"Well, that is just hunky-dory, is it not? That means that whatever your legal difficulty, you are in deep trouble politically, with the grand jury being impaneled to consider a complaint made against you with respect to a misstatement or alleged misstatement filed under this section.

"So I am only reminding the Members of the vulnerability they are assuming for themselves if they adopt these provisions."
124 Cong. Rec. 30429 (1978).

the *only* pronouncement on the relevance of section 1001 to falsified disclosure reports; there simply are not remarks whatsoever from any of the bill's proponents to turn to as "more accurate" explanations of its effect than Wiggins'.[5] Furthermore, the Congressional Record shows that not one Member rose to dispute what Wiggins had to say.

Representative Wiggins was not the only Member interested in the effect of criminal provisions of the United States Code upon EIGA's financial disclosure report requirements. Representative Preyer, who was the Chairman of the Select Committee on Ethics at the time, asked the Department of Justice in April 1978 for an advisory opinion on this very question as it pertained to reports filed by Executive Branch employees. A reply came in the form of a letter from then-Assistant Attorney General for Legislative Affairs Patricia M. Wald. In her letter, Judge Wald stated that it was the Justice Department's opinion that section 1001 "would apply to an Executive Branch employee who knowingly and willfully falsified a material fact in a financial disclosure statement required by bills such as [those under consideration]." Exhibit B to Government's Amended Response to Motion to Dismiss, at 2.

---

[5] During the final, rapidly-passing minutes of his rebuttal to the government's oral argument, defendant's counsel suggested a legislative history matter than he neither addressed in his oral argument nor his papers filed with the Court. Counsel stated that "when they [Members of the House] were discussing civil suits filed against them, so on an[d] so forth, an amendment was actually introduced to permit 1001 to survive under these circumstances, introduced, I believe, by Congressman Panetta, and that was defeated by the House. So with 1001 in front of their eyes and everything else, they excluded a criminal sanction . . . ." (Unofficial excerpt of transcript prepared for Court by Court Reporter).

The amendment to which counsel evidently referred appears at 124 Cong. Rec. 32009 (1978). It provided for a complaint procedure similar to those under federal election laws by which any person could report a violation of EIGA to the Office of Government Ethics. The amendment, as offered by Representative Panetta, stated that "[a]ny person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code." *Id.* It did not concern the applicability of section 1001 to disclosure reports, nor was that issue raised during any part of the debate on the amendment. 124 Cong. Rec. 32009-11 (1978).

Representative Preyer had the benefit of this opinion when he made the remarks quoted from the Congressional Record above. It is further apparent from Judge Wald's letter that Representative Preyer had also been advised by the Clerk of the House of his opinion "that the knowing and willful falsification of a material fact on a statement required to be filed by a Member of Congress, congressional employee or candidate for Congress would subject the reporting individual to the provisions of 18 U.S.C. § 1001." *Id.* at 1.[6]

The inescapable conclusion is that Congress simply did not intend to render section 1001 inapplicable to the intentional falsification of EIGA financial disclosure reports—otherwise, a specific repealing or exempting clause would have been included in the act. Indeed, the form issued by the Clerk of the House upon which Members of Congress are to make their financial disclosures carries at the signature line the following warning:

> NOTE: Any individual who knowingly and willfully falsifies, or who knowingly and willfully fails to file this report may be subject to civil and criminal sanctions. See 2 U.S.C. § 706 and 18 U.S.C. § 1001.

Exhibit A to Government's Amended Response to Motion to Dismiss, at 1. At the hearing, the parties were unable to advise the Court precisely from where came this language other than to opine that it was placed on the form by the Office of the Clerk of the House, nonetheless it evidently has appeared on such forms for a number of years without question from the many Members of Congress and legislative employees who have had occasion to execute the document.[7]

---

[6] Counsel for the government stated at oral argument that the government attempted to obtain the opinion of the Clerk of the House but was unable to do so because it is an "internal document."

[7] A memorandum from the Clerk of the House to "All Members, Officers and Employees Required to File Financial Disclosure Statements Under Rule XLIV [of the House of Representatives]," a copy of which was submitted to the Court on June 8, 1983 by defendant, advised of the instant prosecution and stated that "this office takes no position on [the] question" of "whether [section 1001] applies to filings under the Rule." (In Rule XLIV, section 2, the House adopted the financial disclosure obligations of EIGA as its own internal rule.)

This memorandum has no bearing on the matters at issue here. No matter what the opinion of the Clerk of the House might be at the present

II. The Relevance of the Speech or Debate Clause to Reports Filed by Legislators under EIGA

Defendant argues that the filing by Members of Congress of financial disclosure reports under EIGA constitutes "legislative activity" protected by the Speech or Debate Clause of the Constitution.[8] It does not. The Speech or Debate Clause protects Members of Congress from judicial inquiry into their legislative acts or the motivation for the actual performance of their legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 509, 92 S.Ct. 2531, 2536, 33 L.Ed.2d 507 (1972). The filing of an EIGA report is not a "legislative act," nor bears upon a legislator's motivation for any legislative act.

Brewster was the prosecution of a former United States Senator indicted under a general criminal statute for allegedly accepting a bribe in exchange for a promise relating to an official act, *i.e.*, agreeing to vote a particular way on certain legislation. The Supreme Court held that the Speech or Debate Clause would not preclude the Senator's prosecution because an examination of the indictment and the criminal statute upon which it was based "reveal[ed] that no inquiry into legislative acts or motivation for legislative acts [was] necessary for the Government to make out a prima facie case." 408 U.S. at 525, 92 S.Ct. at 2544.

Defendant asserts that because the Constitution confers upon each House the authority to discipline its members, U.S. Const. art. I, § 5, and because the House may discipline its members for matters relating to financial disclosure reports filed with its Clerk, the filing of such reports falls within the protection afforded "legislative activity" by the Speech or Debate Clause. *Gravel* v. *United States*, 408 U.S. 606, 92 S.Ct.

about section 1001's relevance to financial disclosure requirements, the memorandum does not alter the fact that the Clerk of the House in 1978 evidently put the Chairman of the House Select Committee on Ethics on notice that the section would apply to reports filed pursuant to EIGA. Moreover, the memorandum only refers to section 1001's effect on statements required by the internal House Rule—it carefully avoids mention of the section's applicability to reports compelled by EIGA.

[8] The Speech or Debate Clause provides that "for any Speech or Debate in either House, [Members of Congress] shall not be questioned in any other Place." U.S. Const. art. I, § 6.

2614, 33 L.Ed.2d 583 (1972), cited by defendant, does not support this proposition, nor does *Brewster*, decided the same day. In *Gravel*, the Supreme Court declared that

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either house, but "only when necessary to prevent indirect impairment of such deliberations." *United States* v. *Doe*, 455 F.2d [753], at 760 [(1st Cir. 1972) (same case as *Gravel*)].

408 U.S. at 625, 92 S.Ct. at 2627. Defendant has not shown, nor can this Court divine, any reason why the instant prosecution for false statements would cause "indirect impairment of such deliberations." Nor does this prosecution "threaten the integrity or independence of the [House] by impermissibly exposing its deliberations to executive influence." *See id.* Furthermore, the Speech or Debate Clause "does not privilege [a Member of Congress] to violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Id.* at 626, 92 S.Ct. at 2627.

"The question is whether it is necessary to inquire into how [defendant] spoke, who he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute." *Brewster*, 408 U.S. at 526, 92 S.Ct. at 2544. This prosecution does not make it necessary to inquire into any of these areas because it only refers to defendant's statements on his financial disclosure report, statements which this Court holds are simply outside of the deliberative and communicative functions of the House.

The Second Circuit came to the identical conclusion in *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, ___ U.S. _____, 103 S.Ct. 2437, 2438, 75

L.Ed.2d _____ (1983). In that case, involving the prosecution of several Members of Congress arising from the "Abscam" operation, Representative Lederer objected to the introduction at trial of his EIGA financial disclosure report, asserting that it was privileged under the Speech or Debate Clause. In that report Lederer falsely listed his share of a bribe as a "consulting fee." *Id.* at 849. The court held that the report was not privileged by the clause, stating that

> Though the Clause, in covering "legislative acts," *Gravel* v. *United States*, 408 U.S. 606, 625, 92 S.Ct. 2614, 2627, 33 L.Ed.2d 583 (1972), extends beyond words spoken during legislative debate any other matters it reaches "must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings. . . ." *Id.* Disclosure of income from sources other than employment by the United States, *see* 2 U.S.C. § 702(a)(1)(A), is not part of such "deliberative and communicative processes."

Id. (citations omitted). In reaching this holding, the court also noted that "[p]rosecutions for falsification of similar statements indicate that Lederer's financial disclosure statement was not shielded [by the Speech or Debate Clause]." *Id.*, citing *United States* v. *Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955) (prosecution for false statement to House Disbursing Office); *United States* v. *Diggs*.

Defendant places heavy reliance on *United States* v. *Eilberg*, 465 F.Supp. 1080 (E.D. Pa. 1980). There, the court ruled that the testimony of a Member of Congress before the House Ethics Committee was privileged by the Speech or Debate Clause, citing language in *Gravel* to the effect that a Member's conduct at committee hearings is "within the sphere of legitimate legislative activity." *Gravel*, 408 U.S. at 624, 92 S.Ct. at 2626, *quoted in Eilberg*, 465 F.Supp. at 1083. The committee, the *Eilberg* court stated, "was engaged in the very function the Speech or Debate Clause protects—the right of Congress to preserve its independence by disciplining its own members. This right to discipline is one of the matters 'which the Constitution places within the jurisdiction of either house.'" *Eilberg*, 465 F.Supp. at 1083, *quoting Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627.

The portion of *Gravel* quoted by the *Eilberg* court is within the extended quotation from that case above in this Memorandum Opinion. When the brief passage is read in context, it is clear that to the extent that the privilege embraces such "other matters" within the House's jurisdiction, it only applies *"when necessary to prevent indirect impairment of such deliberations." Gravel*, 408 U.S. at 625, 92 S.Ct. at 2627 (emphasis added). It is difficult to see how applying the Speech or Debate Clause privilege to the *Eilberg* defendant's *testimony*—as opposed to the Committee members' statements and questions—could have been "necessary" to prevent impairment of the Committee's deliberations. The mere fact that Congress may provide some internal inquiry or sanction for certain misconduct of its members does not thereby insulate its members from all possible criminal liability for such actions. In any case the facts of *Eilberg* are distinguishable from those of the instant matter, which does not involve any statements made on the floor of the House.

Any suggestion that Congress intended that discipline of members for failures to comply with EIGA's provisions be kept an in-house matter is completely belied by the fact that Congress specifically opened the act's disclosure requirements up to external scrutiny by vesting in the Attorney General the authority, under section 706 of the act, to bring civil actions to prosecute violations of those requirements. Moreover, that EIGA is a three-branch plan in which officials of the executive and judicial branches have equal disclosure requirements have a broader purpose than mere internal policing but also concern the public's right to know about the financial interests of its governmental leaders.

Accordingly, the Speech or Debate Clause does not privilege defendant from prosecution for the matters alleged in the indictment. The government can make out a prima facie case without having to inquire into any legislative acts or the motivation therefor. The remaining question relevant to this issue is whether defendant has the right to an immediate, pretrial appeal of this portion of this Court's decision.

The government acknowledges that pretrial appeals from denials of motions to dismiss generally are permissable under

the rule of *Helstoski* v. *Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). In fact, the Supreme Court held in that case that a pretrial motion rejecting a Speech or Debate Clause defense is a "final decision" creating appellate jurisdiction under 28 U.S.C. § 1291. 442 U.S. at 506, 99 S.Ct. at 2448. Nevertheless, the government suggests that the Speech or Debate Clause defense asserted in this case is frivolous, and therefore contends that despite *Helstoski* no pretrial appeal is available.

There apparently is no precedential authority for the proposition that *Helstoski* does not apply to a frivolous Speech or Debate Clause defense. As such, the government relies on analogy to a line of cases beginning with *United States* v. *Dunbar*, 611 F.2d 985 (5th Cir.), *cert. denied*, 447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980), concerning pretrial appeals of denials of "frivolous" double jeopardy motions made pursuant to the rule of *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

Under the *Dunbar* rule, an appeal of a denial of a double jeopardy motion does not divest the District Court from jurisdiction to proceed with the trial of the case where the District Court makes a written finding that the appeal is frivolous. 611 F.2d at 989.

Defendant aptly points out a significant problem with this analogy. Unlike Speech or Debate claims, which only may be raised in prosecutions having some relation to Congress' legislative functions, double jeopardy arguments conceivably can be raised in any type of case where circumstances warrant. The likelihood of abuse of the appeal right through the assertion of frivolous claims is much greater in the *Abney* context. *See United States* v. *Brizendine*, 659 F.2d 215, 225-26 (D.C. Cir. 1981) (noting suspected abuse of double jeopardy claims in the Ninth Circuit). Accordingly, this Court is not persuaded that the *Dunbar* rule should apply to the denial of a motion to dismiss based on Speech or Debate Clause arguments.

The lack of precedent regarding frivolous pretrial appeals on Speech or Debate grounds and this Court's view of what the rule should be do not, of course, preclude this Court from entering written findings, if appropriate, as to whether the

appeal is frivolous. Yet although the Court finds defendant's arguments on this issue unpersuasive and devoid of merit, the Court nonetheless declines to make such findings. Considering that the suggested potential for abuse of the appeal right in double jeopardy cases (or at least the magnitude thereof) is not present in cases such as this, the Court does not find it appropriate to rely here upon the standards for determining an appeal "frivolous" in those cases.

III. Selective Prosecution

Defendant argues that he was singled out for prosecution because of his history of confrontation with and criticism of the executive branch. He asserts that this constitutes a violation of his right to equal protection of the law under the fifth amendment to the Constitution. He also seeks discovery on the issue of selective prosecution. Defendant has failed to establish even a colorable claim of unconstitutional selective prosecution. As a result, the defendant's argument that the indictment should be dismissed on this ground is rejected and his request for discovery on the issue is denied.

There is a two-pronged test for establishing a prima facie case of selective prosecution: (1) that others similarly situated were not prosecuted (*i.e.*, there was a selection) and (2) the decision to select the defendant for prosecution was improperly motivated. *E.g., Attorney General of the U.S.* v. *Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983). Accordingly, while some forms of conscious selection are permissible, *United States* v. *Diggs*, 613 F.2d at 1003, "[t]wo kinds of motives [for selection] are apparently impermissible: those which have no rational basis under the statutory scheme being enforced, and those which are in and of themselves violative of the Constitution." *Irish People*, 684 F.2d at 935. Discovery on the issue is permitted only where the defendant can make a "colorable claim of discriminatory prosecution." *Diggs*, 613 F.2d at 1003 n. 87.

Defendant has failed to show that there has been any selection. He has not directed the Court's attention to anyone *similarly* situated who has not been prosecuted. Defendant

makes reference to a report of the Comptroller General dated May 30, 1980 and has provided a copy of another report of the Comptroller dated March 4, 1981 to the effect that numerous persons subject to the requirements of EIGA failed to file their reports timely. Motion to Dismiss at 62; Exhibit II to Motion to Dismiss. He asserts that none of these (unidentified, it should be noted) persons were investigated by the Justice Department and that this demonstrates discrimination. It does not. None of these people could be prosecuted under section 1001 since that statute does not apply to mere failures to file.

Next, defendant asserts that the government's failure to prosecute the Attorney General for an erroneous EIGA report proves discrimination. Yet defendant acknowledges that the Attorney General filed an amended report to correct the error. Motion to Dismiss at 63 n. 7. Accordingly, he and the Attorney General are not "similarly situated."

In his reply brief defendant submits that information in the March 1981 Comptroller General report concerning inaccuracies and omissions in pre-EIGA financial disclosure reports filed in 1978-79 pursuant to Senate Rule 42 demonstrates improper selection. Yet as those persons were not subject to EIGA, again, their position is not the same as defendant's.

Defendant also comments on various other prosecutions of Members of Congress, including the Abscam prosecution of Representative Lederer in *United States* v. *Myers*, asserting that they could have been, but were not, prosecuted under section 1001 for false statements in EIGA reports. Defendant emphasizes the Second Circuit's statement in *Myers* that Lederer "falsely listed [on his disclosure report] his $5,000 share of [a] bribe as 'a consulting fee.'" 692 F.2d at 849. But he and the others *were* prosecuted for other, more serious offenses. The fact that the government did not add every conceivable offense to the Abscam indictments does not show that those defendants were treated more leniently than the defendant in the instant case.

As defendant has made no colorable showing that he was singled out for prosecution his request for dismissal of the indictment on this ground as well as his motion for discovery are denied. Nonetheless, it can be observed that there appears

to be no basis whatsoever for defendant's contention that the government harbored an improper motivation for initiating this prosecution. As noted above, in *Diggs* the Court of Appeals discerned two kinds of improper motives for selection: those lacking a rational basis under the statute being enforced and those inherently offensive to the Constitution. 613 F.2d at 1003. There can be no serious doubt that this prosecution has a rational basis under both EIGA and section 1001. Prosecuting false statements in EIGA reports is consistent with EIGA's purposes which include, *inter alia*, deterring conflicts of interest and maintaining a high level of integrity among public officials. *See* S.Rep. No. 170, 95th Cong., 1st Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4216, 4237-38. It also is consistent with the purpose of section 1001 to ensure that people do not intentionally make false statements to agencies and departments of the government.

Instead, defendant argues generally that the government is out to punish him for exercising his rights under the first amendment to speak out against the executive branch and, in particular, the Internal Revenue Service. However, none of the numerous materials defendant has presented as exhibits to his motion support this contention in any way. While he provides a vast number of documents of his own creation—letters to various officials, essays submitted by him to the Congressional Record, books critical of the IRS—chronicling his own crusades, but a few of the papers submitted concern the executive branch's responses to his activities. In not one of these documents is there any evidence that the government harbored a desire to punish defendant for speaking out.

One of these communications is a copy of a letter from the then-Commissioner of Internal Revenue to defendant, dated February 24, 1978, in response to defendant's letter to the Commissioner alleging numerous improprieties on the part of the IRS. The Commissioner's letter demonstrates no hostility whatsoever, but on the contrary is polite and responsive in detail to defendant's allegations. Consistently through the letter the Commissioner assured defendant that his charges would be investigated once defendant would provide more specificity as to his allegations. At oral argument defendant's counsel referred to this letter as "virtually a threat," asserting that it warned

defendant to cease "hurting the morale" of IRS employees. The only portion of the Commissioner's letter to which this possibly could refer is the last paragraph, which reads:

> I have tried to be responsive to your concerns and assure you that the Service will not tolerate discrimination in either its personnel policies or its examination policies based upon religion. Any facts at all to support your allegations in this regard should be made known to me. Generalized allegations do a disservice to the thousands of dedicated people who make up the Internal Revenue Service.

Exhibit II to Motion to Dismiss. This is not a threat. Nor does it demonstrate any antagonism on the part of the Commissioner, the IRS or the executive branch toward defendant.

Similarly, the letters from the Assistant Attorney General of the Justice Department, Criminal Division, to defendant dated December 11, 1981 and February 8, 1982 concerning other allegations of IRS misconduct provide no support to defendant's assertion that the government has a vendetta against him. *See* Exhibit VIII to Motion to Dismiss. The letter from the Chairman of the Securities and Exchange Commission to defendant dated January 14, 1983 likewise is innocuous.

For the foregoing reasons, and upon consideration of the entire record in this matter, defendant's motion to dismiss the indictment and his motion for discovery as to the question of selective prosecution shall both be denied.

It is this Court's respectful view that as the Speech or Debate Clause issue is immediately appealable, it would be more efficient for the Court of Appeals to consider the other two issues raised in the motion to dismiss at the same time. In *United States* v. *Myers*, 635 F.2d 932, 935-36 (2d Cir.) (pretrial appeal), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980), the Second Circuit not only ruled that a challenge to an indictment on separation of powers grounds was immediately appealable along with the Speech or Debate Clause question, but declared that it "would not be too extravagant to suggest that a Member of Congress should be entitled to pretrial review of the denial of any legal claim that could be

readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment." The court noted that circumstances particular to Members of Congress militating in favor of a pre-trial appeal of all issues were "especially compelling." *Id.* at 936.

The Court of Appeals for this Circuit has not spoken as to the matters addressed in this dictum from *Myers*. Nonetheless, the inefficiency and delay that piecemeal appeals would cause persuade this Court that the entire matter addressed this date should be submitted to the Court of Appeals at one time. The trial previously scheduled for June 20, 1983, must however, be continued pending appellate review of the instant decision.

An Order consistent with the above accompanies this Memorandum Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The United States of America	)	
	)	
v.	)	
	)	Criminal No. 83-00075
George Vernon Hansen,	)	
	)	FILED
Defendant.	)	JUN 16 1983
		JAMES F. DAVEY, Clerk

ORDER

In the Memorandum Opinion and accompanying Order filed in this case on June 13, 1983 certain references were made to interlocutory appeals under 28 U.S.C. § 1292(b). That statute by its terms is only relevant to civil actions. It is the view of this Court that all matters addressed in the Memorandum Opinion should be immediately appealable–including the two arguments in favor of dismissal other than that based upon the Speech or Debate Clause–either under the rule suggested by the Second Circuit in *United States* v. *Myers*, 635 F.2d 932, 935-36 (2d Cir. 1980) or under general considerations of judicial efficiency. Any references to 28 U.S.C. § 1292(b) in the Memorandum Opinion are hereby deemed to be by way of analogy only, and the reference to that section in the Order is hereby vacated.

SO ORDERED.

This the 16th day of June, 1983.

/s/
JOYCE HENS GREEN
United States District Judge

Office - Supreme Court, U.S.
FILED
NOV 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-729

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE VERNON HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

REID H. WEINGARTEN
JAMES M. COLE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether interlocutory appellate review is available to a Member of Congress who claims that a federal indictment is insufficient, and that he is a victim of selective prosecution.

2. Whether financial disclosure reports required of Members of Congress by the Ethics in Government Act of 1978 are protected by the Speech or Debate Clause.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651	5, 6, 9
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541	4
Coopers & Lybrand v. *Livesay*, 437 U.S. 463	4
DiBella v. *United States*, 369 U.S. 121	4
Doe v. *McMillan*, 412 U.S. 306	13
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491	10
Gravel v. *United States*, 408 U.S. 606	10, 12
Helstoski v. *Meanor*, 442 U.S. 500	5
Kilbourn v. *Thompson*, 103 U.S. 168	10
Powell v. *McCormack*, 395 U.S. 486	10
Stack v. *Boyle*, 342 U.S. 1	4
United Mine Workers v. *Gibbs*, 383 U.S. 715	9
United States v. *Bird*, 709 F.2d 388	4
United States v. *Bramblett*, 348 U.S. 503	11
United States v. *Brewster*, 408 U.S. 501	10, 11, 12
United States v. *Diggs*, 613 F.2d 988, cert. denied, 446 U.S. 982	11
United States v. *Doe*, 455 F.2d 753	12
United States v. *Eilberg*, 465 F. Supp. 1080	13
United States v. *Hastings*, 681 F.2d 706, cert. denied, No. 82-863 (Feb. 22, 1983)	9
United States v. *Helstoski*, 442 U.S. 477	10, 11
United States v. *Hollywood Motor Car Co.*, 458 U.S. 263	4, 8, 9
United States v. *Johnson*, 383 U.S. 169	12

Cases—Continued: Page

United States v. *MacDonald*, 435 U.S. 850 6
United States v. *Myers*, 635 F.2d 932, cert. denied, 449 U.S. 956 8
United States v. *Myers*, 692 F.2d 823, cert. denied, No. 82-1183 (May 31, 1983) 10-11

Constitution and statutes:

U.S. Const.:
Art. 1, § 5, Cl. 2 12
Art. 1, § 6 (Speech or Debate Clause) 2, 3, 5, 8, 10, 13
Amend. V (Double Jeopardy Clause) 5
Amend. VIII 5

18 U.S.C. 201 8
18 U.S.C. 1001 ..... 2, 3, 6
28 U.S.C. 1291 ..... 3, 4, 6, 7, 8, 9
Ethics in Government Act of 1978, 2 U.S.C. 701 *et seq.*:
2 U.S.C. 701-709 2
2 U.S.C. 705 13
2 U.S.C. 706 3

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-729

GEORGE VERNON HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is not reported. The opinion of the district court (Pet. App. F1-F22) is reported at 566 F. Supp. 162.

JURISDICTION

The judgment order of the court of appeals was entered on August 1, 1983. A petition for rehearing (Pet. App. C1, D1) was denied on September 26, 1983. The petition for a writ of certiorari was filed on November 2, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 7, 1983, petitioner, an Idaho Congressman, was charged in a four-count indictment with filing with Congress false financial disclosure statements (required by the Ethics in Government Act of 1978, 2 U.S.C. 701-709), in violation of 18 U.S.C. 1001. The district court denied his motion to dismiss the indictment on speech or debate and other grounds (Pet. App. F1-F22). The court of appeals affirmed the speech or debate ruling and dismissed the appeal insofar as it presented other grounds challenging the validity of the indictment (Pet. App. A1).

1. The indictment charged petitioner with misrepsenting the extent and nature of his financial liabilities during 1981 by excluding loans totaling $135,000 made to him (Count I); misrepresenting the extent and nature of his and his wife's financial liabilities during 1980 by excluding a $61,503.42 loan (Count II); falsely representing that neither he nor his wife had engaged in commodities futures transactions in 1979, when in fact they had purchased 125 silver futures contracts valued at $3,877,800 on January 16, 1979, and sold those contracts on January 18, 1979, for a profit of $87,475 (Count III); and misrepresenting the extent and nature of his and his wife's financial liabilities during 1978 by excluding a $50,000 loan (Count IV).

Following return of the indictment, petitioner made three arguments before the trial court to support his motion to dismiss the indictment: (1) that the Speech or Debate Clause of Article 1, Section 6 of the Constitution protects him from any prosecution concerning reports required by the Ethics in Government Act of 1978 (EIGA); (2) that the financial disclosure requirements of the EIGA are not subject to criminal

sanctions under 18 U.S.C. 1001 because Congress intended that they be enforced only by civil measures; and (3) that he is a victim of selective prosecution.

On June 13, 1983, the district court denied petitioner's motion to dismiss. It ruled that the filing of financial disclosure reports by Members of Congress is not legislative activity protected by the Speech or Debate Clause (Pet. App. F13-F18); that the civil sanctions set forth in the EIGA (2 U.S.C. 706) did not preempt or repeal by implication the criminal sanction of 18 U.S.C. 1001 for false statements in connection with any matter within the jurisdiction of any department or agency of the United States (Pet. App. F2-F12); and that petitioner had not established a prima facie case of selective prosecution (Pet. App. F18-F21). The court commented that since the Speech or Debate Clause issue was immediately appealable, it would be more efficient for the court of appeals to consider the other two issues raised by petitioner at the same time (Pet. App. F21).

2. Petitioner filed an interlocutory appeal, seeking review of all the issues raised in his motion to dismiss. The government moved for summary affirmance on the speech or debate issue and dismissal for lack of appellate jurisdiction on the other two issues. The court of appeals granted this motion (Pet. App. A1). It affirmed the ruling denying the motion to dismiss on speech or debate grounds for the reasons stated in the district court's opinion. It dismissed the appeal from the other rulings on the ground that they were not final decisions under 28 U.S.C. 1291, and did not fit within any exception to the finality requirement.

ARGUMENT

1. Petitioner contends (Pet. 6-16) that his status as a Congressman compelled the court of appeals to review the pretrial rulings that false financial disclosure statements are subject to criminal sanctions and that he is not the victim of selective prosecution. The court of appeals properly refused to consider these contentions on petitioner's interlocutory appeal.

Congress has limited the jurisdiction of the courts of appeals to "final decisions of the district courts." 28 U.S.C. 1291. As recently noted in *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982), this Court has repeatedly emphasized the special importance of strictly enforcing the final judgment rule in criminal cases. The statute's "insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases." *Id.* at 265 (quoting *DiBella* v. *United States*, 369 U.S. 121, 124 (1962)). See also *United States* v. *Bird*, 709 F.2d 388 (5th Cir. 1983).

This Court has construed 28 U.S.C. 1291 to permit exceptions to the need for finality in only a limited category of cases falling within the "collateral order" rule of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). "Such orders 'must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' " *Hollywood Motor Car*, 458 U.S. at 265 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

In criminal cases, this Court has found such collateral orders on only three occasions. First, *Stack* v. *Boyle*, 342 U.S. 1 (1951), held that an order deny-

ing a motion to reduce bail pending trial was immediately appealable. Not only is the issue of bail entirely separate from the merits, but meaningful review of what is charged to be a deprivation of a specifically protected Eighth Amendment right cannot be had after sentence, since the issue necessarily becomes moot with the commencement of trial.

Abney v. *United States*, 431 U.S. 651 (1977), like *Stack* v. *Boyle*, was a case where the lack of immediate review could have resulted in the irremediable deprivation of a specific constitutional right. *Abney* allowed a defendant to take an interlocutory appeal from an order denying a motion to dismiss an indictment on double jeopardy grounds, relying upon the principle that the Double Jeopardy Clause prohibits not only multiple convictions, but also multiple trials for the same offense—an injury that could not be remedied on post-conviction review. 431 U.S. at 660-661. Moreover, "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial" (*id.* at 659).

Helstoski v. *Meanor*, 442 U.S. 500 (1979), the third case, fits precisely the mold defined in *Stack* and *Abney*. The Court there held that a Member of Congress could take an interlocutory appeal in order to assert his Speech or Debate Clause privilege. 442 U.S. at 506-508. Such a claim is collateral in the sense that the defendant makes no challenge to the merits of the charge against him (*id.* at 507). And because the Clause is intended to prevent questioning of Members about legislative acts—not just conviction based on those acts—immediate appeal must be available to guard against the very evil the Clause addresses.

Unlike these three discrete exceptions to the doctrine of finality, the district court's rejection of petitioner's non-speech or debate claims was clearly not a collateral order. Cf. *United States* v. *MacDonald*, 435 U.S. 850 (1978). Petitioner's claim that 18 U.S.C. 1001 does not apply to his financial disclosure statements, like the pendent claim of sufficiency of the indictment in *Abney* v. *United States*, 431 U.S. at 663,

> is plainly not "collateral" in any sense of that term; rather it goes to the very heart of the issues to be resolved at the upcoming trial. Secondly, the issue * * * is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results.

And petitioner's claim of selective prosecution, like the claim of prosecutorial vindictiveness in *Hollywood Motor Car*, "fails the [requirement] for *Cohen* appeals * * * that the claim 'be effectively unreviewable on appeal from a final judgment.'" 458 U.S. at 267. Moreover, in contrast to the claims in *Stack*, *Abney*, and *Helstoski*, the non-speech-or-debate issues that petitioner seeks to have immediately reviewed are not grounded in any specific constitutional guarantee whose very purpose would be frustrated by the failure to relax the jurisdictional requirement of 28 U.S.C. 1291.

Petitioner advances a number of policy reasons why he should be treated differently from other defendants who might raise identical statutory or selective prosecution claims. He argues, for example, that he should be permitted greater opportunities to avoid trial via preliminary "motions and appeals" so that he may be "free to continue his work in Congress relatively unimpaired" (Pet. 11). He adds that un-

less interlocutory appeal is permitted, he will suffer "tremendous time demands and financial[,] * * * psychological and physical drain"—problems compounded by "the extensive press coverage that follows when the defendant is a political figure" (*ibid.*). Avoidance of such entanglements is important, he notes, not only in his own interest but because the effective representation of his constituents demands it.

These concerns are properly addressed to Congress, which is of course free to amend Section 1291 if it concludes that the special status of legislators calls for an exception to the normal requirement of finality. We note, however, that it is by no means clear that the concerns raised by petitioner would not be better served by a district court rule requiring such trials to take precedence over other pending matters than by a rule permitting proliferation of "motions and appeals." It may be doubted whether increased pretrial appellate litigation in this and similar cases will actually reduce the financial, psychological, and physical drains on defendants, or permit indicted Members to serve their constituents more effectively. To the contrary, it seems more likely that speedy resolution of such charges better serves the public interest than the opening of new avenues for protracted delay of trials.

There is in any event simply no warrant, either in the jurisdictional language of 28 U.S.C. 1291 or in this Court's prior decisions, for permitting the right of appeal to turn not on the nature of the issue but on the identity of the defendant. Section 1291 gives the courts of appeals jurisdiction over "final decisions of the district courts," language that *Cohen* and its progeny have interpreted to mean orders that resolve

a collateral "*issue*" and are "effectively unreviewable on appeal from a final judgment." *Hollywood Motor Car*, 458 U.S. at 265 (emphasis added).

Petitioner nevertheless relies on *United States* v. *Myers*, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980), for the proposition that non-speech-or-debate issues may be reviewed by a court of appeals once it has already accepted appellate jurisdiction over a speech or debate claim.[1] It is true that portions of the Second Circuit's opinion in *Myers* are difficult to reconcile with the dismissal by the court below of petitioner's appeal on the statutory and selective prosecution issues. But the Second Circuit in *Myers* specifically stated that "[w]e need not determine the full extent of pre-trial appellate jurisdiction in * * * cases" involving Members of Congress. 635 F.2d at 936. The court noted that "[t]he claims of Congressman Myers are, with one exception, all grounded on either the Speech or Debate Clause or the doctrine of separation of powers" (*ibid.*). The one exception was a claim that the indictment failed to state an offense under 18 U.S.C. 201 because of the government's role in the Abscam scheme—a claim that was both combined with and "illuminated by" Myers' Speech or Debate Clause argument. 635 F.2d at 937, 938.

It may thus be that the Second Circuit's opinion in *Myers* stands only for the proposition that "pendent appellate jurisdiction" (*id.* at 936), much like the doctrine of pendent jurisdiction over state claims in federal district courts, may be exercised as a matter

---

[1] We note that the policy concerns advanced by petitioner to support liberalized interlocutory review for Members of Congress would appear to apply with equal force whether or not the claims are pendent to a speech or debate claim.

"of discretion, not of plaintiff's right[, where] * * * considerations of judicial economy, convenience and fairness to litigants" warrant. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Such a conclusion is not inconsistent with the court of appeals' refusal to take jurisdiction here over petitioner's nonconstitutional claims, which it could justifiably have concluded were too unrelated to the speech or debate issue to warrant combined consideration. Although we do not endorse the correctness of the theory that may explain the Second Circuit's action, particularly in light of the difficulties noted in *Abney* v. *United States*, 431 U.S. at 663, we nevertheless suggest that its application there does not conflict with this case in a manner warranting this Court's review. This is especially true given the infrequency with which the issue will arise.

We note, moreover, that the decision in *Myers* was rendered before this Court's most recent exploration of 28 U.S.C. 1291 in the context of a criminal case. See *United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 270. If the Second Circuit has occasion to revisit the question, it presumably will be obliged to rethink its conclusions in light of this Court's emphasis that "only a narrow group of claims [can] meet the test" embodied in Section 1291.[2]

2. Petitioner also contends (Pet. 16-21) that the filing by members of Congress of financial disclosure reports under the EIGA is "legislative activity" pro-

---

[2] Petitioner also relies on *United States* v. *Hastings*, 681 F.2d 706, 708 (11th Cir. 1982), cert. denied, No. 82-863 (Feb. 22, 1983), where the court reviewed a federal judge's claim of immunity from prosecution until after impeachment and conviction by Congress. Such a challenge, however, unlike petitioner's claims, asserts a right that would be destroyed if it were not vindicated before trial.

tected by the Speech or Debate Clause. This claim was properly rejected by the court of appeals.

The Speech or Debate Clause "was designed to preclude prosecution of Members [of Congress] for legislative acts." *United States* v. *Helstoski*, 442 U.S. 477, 488 (1979). To effectuate the purpose of the privilege, the Clause shelters not only actual speeches and debates, but also any "act generally done in Congress in relation to the business before it." Thus, "the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." *United States* v. *Brewster*, 408 U.S. 501, 512, 525 (1972). For example, the Clause bars inquiry into the votes of Members of Congress, *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881); *Powell* v. *McCormack*, 395 U.S. 486 (1969), participation in committee hearings, *Gravel* v. *United States*, 408 U.S. 606 (1972), and investigations or investigatory subpoenas by Congress, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1972).

In *Gravel* v. *United States*, 408 U.S. at 625, this Court explained what it meant by "legislative acts":

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

As the Second Circuit held in *United States* v. *Myers*, 692 F.2d 823, 849 (1982), cert. denied, No. 82-1183

(May 31, 1983), the filing of an EIGA financial disclosure statement plainly does not fit within this definition.

Nor is there, as petitioner urges, a distinction between the evidentiary use of EIGA reports permitted in *Myers*, and the use of such reports as the basis for a false statements prosecution. The Clause is, after all, designed to prevent probing into or otherwise inhibiting members' freedom in the deliberative and communicative processes. And this Court has held that there is no material difference in the impacts on those processes attending use of the reports as evidence at trial to prove a bribery charge, on the one hand, and their use as the basis for a false statements prosecution, on the other. See *United States* v. *Helstoski*, 442 U.S. at 489.

Petitioner argues (Pet. 19), however, that the financial reports are protected by the Speech or Debate Clause because they are "an integral part of the participation by Members in the discharge of Congressional disciplinary authority." But *Gravel* v. *United States*, relied upon by petitioner, does not stand for the proposition that Congress alone can discipline its members, or that the Speech or Debate Clause renders inadmissible evidence of a Congressman's conduct that is somehow related to the congressional disciplinary function. Congress has the authority to discipline members who submit false statements to the House Disbursing Office, *United States* v. *Bramblett*, 348 U.S. 503 (1955); who submit false statements to the House Finance Office, *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980); who take money in return for promises of future congressional favor, *United States* v. *Brewster*, 408 U.S. 501 (1972); and who take money in return

for lobbying the Department of Justice, *United States* v. *Johnson*, 383 U.S. 169, 185 (1966). But notwithstanding the congressional authority to discipline, all of these acts were also held to be proper subjects for criminal prosecution.[3] Given the lack of specific standards circumscribing Congress's control over member conduct (see U.S. Const. Art. 1, § 5, Cl. 2), to say that all activity within the orbit of potential congressional discipline is protected against prosecution would be tantamount to an unrestricted grant of immunity to members of Congress.[4]

Petitioner incorrectly draws from *Gravel*, 408 U.S. at 625, the general principle that the Speech or Debate Clause protects against inquiry not only into the deliberative and communicative processes, but also into "other matters * * * within the jurisdiction of either House" (Pet. 18). But as *Gravel* makes clear, inquiry into such "other matters" is forbidden only " 'when necessary to prevent indirect impairment of [legislative] deliberations.' " 408 U.S. at 625 (quoting *United States* v. *Doe*, 455 F.2d 753, 760 (1st Cir. 1972)). Congressmen file their financial disclosure statements with the House Clerk each year. The Clerk sends copies of the statements to the House Committee on Standards of Official Conduct for its review. That Committee is empowered to "determine

---

[3] "Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentially related to the legislative process." *United States* v. *Brewster*, 408 U.S. at 518.

[4] We note that petitioner's position on the Speech or Debate issue would immunize Members from prosecution for the identical acts that *could* be punished if performed by federal judges and many executive officials, who file virtually identical forms pursuant to the EIGA.

whether the reports are filed in a timely manner, are complete, and are in proper form." 2 U.S.C. 705. It is difficult to conceive how a criminal prosecution involving use of the disclosure reports could impair in any way the work of the Standards Committee.[5]

In any event, the Speech or Debate Clause does not distinguish between civil and criminal cases. *Doe* v. *McMillan*, 412 U.S. 306, 311-312 (1973). And by including a civil remedy in the EIGA (2 U.S.C. 706), Congress not only ceded to the executive the right to discipline members, but also anticipated judicial proceedings in which Congressmen would be questioned about their financial disclosure statements. It is thus apparent that Congress did not consider financial disclosure statements to be protected "legislative acts" in a civil context. The same should be no less true here, where only the sanctions—not the acts in question—are different.

In sum, a Congressman's financial disclosure statements simply are not legislative acts, and are not protected by the Speech or Debate Clause. The ruling denying petitioner's motion to dismiss on Speech or Debate Clause grounds was correct.

---

[5] In *United States* v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1979), upon which petitioner also relies, the court simply ruled that a Congressman's own testimony before the House Ethics Committee was protected by the Speech or Debate Clause.

CONCLUSION

The petition for a writ of certiortari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

REID H. WEINGARTEN
JAMES M. COLE
Attorneys

NOVEMBER 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 427144 166

FILED
JAN 3 1984
ALEXANDER L. STEVAS
CLERK

No. 83-729

IN THE

Supreme Court of the United States

October Term, 1983

THE HONORABLE GEORGE V. HANSEN,
Member of Congress, 2D District of Idaho,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

Frank A. S. Campbell
William Stoll Hemsley, Jr.
HEMSLEY & CAMPBELL
1111 Nineteenth Street, N.W.
Suite 301
Washington, D.C. 20036
(202) 659-0550

Counsel for Petitioner

TABLE OF CONTENTS

	Page
Table of Authorities	i
ARGUMENT	
I. CONGRESSMAN HANSEN'S CLAIMS SATISFY THE REQUIREMENTS OF THE COLLATERAL ORDER DOCTRINE	1
II. THE SPEECH OR DEBATE CLAUSE PROTECTS EIGA REPORTS FILED BY CONGRESSMEN WITH THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Abney v. *United States*, 431 U.S. 651 (1977)	1,5,6
Buckley v. *Valeo*, 424 U.S. 1 (1976)	7
Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)	1,4,5,6,7
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	1
Gravel v. *United States*, 408 U.S. 606 (1972)	8,9
Helstoski v. *Meanor*, 442 U.S. 500 (1979)	1
Immigration and Naturalization Service v. *Chadha*, – U.S. – , 77 L.Ed.2d 317 (1983)	2
Nixon v. *General Services Administration*, 433 U.S. 425 (1977)	2
Stack v. *Boyle*, 342 U.S. 1 (1951)	1

Page

CASES (Continued)

United States v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980) 8

United States v. *Helstoski*, 442 U.S. 477 (1979) 9

United States v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) 1,4,6

United States v. *MacDonald*, 435 U.S. 850 (1978) 6

United States v. *Myers*, 635 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980) 2,3,4,5

United States v. *Myers*, 692 F.2d 823 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983) 7

United States v. *Nixon*, 418 U.S. 683 (1974) 2,10

CONSTITUTION AND STATUTES

U.S. Const. art. I, §6, cl. 1 (Speech or Debate Clause) ..... *Passim*

2 U.S.C. §701 *et seq.* 7

2 U.S.C. §705 9

18 U.S.C. §1001 7

28 U.S.C. §1291 2

ARGUMENT

I. CONGRESSMAN HANSEN'S CLAIMS SATISFY THE REQUIREMENTS OF THE COLLATERAL ORDER DOCTRINE

The government argues in its Opposition that the District Court's denial of Congressman Hansen's non-Speech or Debate claims of selective prosecution and preemption of criminal sanctions for reporting violations under the Ethics in Government Act does not fall within the collateral order exception to the finality rule established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949). In *Cohen*, this Court held that the finality rule embodied in 12 U.S.C. §1291 allows appellate review of trial court decisions which do not terminate the litigation only in the limited category of cases satisfying the requirements of what has become known as the "collateral order" doctrine. Such collateral orders " 'must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' " *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)).

The government's position that the *Cohen* criteria are not met here derives principally from its contention that, unlike the claims in *Stack* v. *Boyle*, 342 U.S. 1 (1951) (bail reduction), *Abney* v. *United States*, 431 U.S. 651 (1977) (double jeopardy) and *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (Speech or Debate), "the non-speech or debate issues that petitioner seeks to have immediately reviewed are not grounded in any specific constitutional guarantee whose very purpose would be frustrated by the failure to relax the jurisdictional requirement of 28 U.S.C. 1291." (Brief for the United States at 6). However, such a constitutional guarantee is indeed encompassed by Petitioner's non-Speech or Debate claims and its undeniable involvement here is what satisfies *Cohen*'s three-part collateral order standard.

The right whose purpose would be frustrated by disallowing its vindication on appeal prior to trial here exists by virtue

of the constitutional doctrine of separation of powers. That doctrine provides in part that "[o]ne branch [of government] may [not] interfere impermissibly with the other's performance of its constitutionally assigned function." *Immigration and Naturalization Service* v. *Chadha*, – U.S. – , 77 L.Ed.2d 317, 352 (1983) (Powell, J., concurring) (citing *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), and *United States* v. *Nixon*, 418 U.S. 683 (1974)).

As in the case of a prosecution barred by the Speech or Debate Clause because it is based upon acts done in either House, the trial of a Member of Congress in a federal criminal prosecution that is based upon an invalid legal theory or is otherwise fatally defective is a constitutionally impermissible interference by the Executive and Judicial Branches with the representational function of the Legislative Branch. The trial's interference with the Member's representational responsibilities is as great in either case. (*See* Petition at 10-12). The interference becomes equally impermissible in the case involving non-Speech or Debate claims when those claims are amenable to ready resolution before trial and their remedy requires dismissal of the charges. Where such interference may be avoided by the advancement of claims challenging the prosecution through the appellate level before trial, vindication of the interests protected by the separation of powers doctrine requires that the opportunity for such a challenge be afforded.

It was the recognition of the involvement of these separation of powers concerns that led the Second Circuit in *United States* v. *Myers*, 635 F.2d 935-36 (2d Cir.), *cert. denied*, 449 U.S. 956 (1980), to hold that a Member of Congress has a right to immediate appeal of "the denial of any legal claim that could be readily resolved before trial and would, if upheld, prevent trial or conviction on a pending indictment."[1] The *Myers*

[1] Petitioner disagrees with the government's suggestion that the exercise of jurisdiction by the Second Circuit over Congressman Myers' non-Speech or Debate claims was solely on the basis of pendent appellate jurisdiction. (Brief for the United States at 8-9). Rather, the court's reference to pendent appellate jurisdiction was merely to that of an alternative, secondary basis for review of those issues before trial. The court concluded in effect that it could proceed under either of the two jurisdictional theories. The Second Circuit's statement in *Myers* that it "need not determine the

court prefaced its appealability holding by the following observations concerning the doctrine of separation of powers:

> Like the Speech or Debate Clause, the doctrine of separation of powers serves as a vital check upon the Executive and Judicial Branches to respect the independence of the Legislative Branch, not merely for the benefit of the Members of Congress, but, more importantly, for the right of the people to be fully and fearlessly represented by their elected Senators and Congressmen.

Id. at 935-36. The court concluded that these same separation of powers concerns exist in federal prosecutions of Members of Congress regardless of whether the Member raises issues based directly upon the Speech or Debate Clause or the separation of powers doctrine.

More specifically, the "right to full representation" protected by the separation of powers doctrine is the right to representation by our elected representatives without unnecessary interference with or interruption of their ability to vote and debate on our behalf in Congress. Thus, in supporting its conclusion that certain non-Speech or Debate claims must also be immediately appealable, the *Myers* Court stated:

> . . . the pendency of criminal charges against a Member of Congress and a trial of those charges implicate aspects of our representative form of government. The Member's capacity to represent his constituents is inevitably impaired. In the case of a Congressman, he is their sole voice and vote in the House of Representatives.

Id. The "right to fearless representation" protected by the separation of powers doctrine is the right to representation without the chill or intimidation of a fatally defective federal criminal prosecution of our elected representatives by the Executive

---

full extent of pre-trial appellate jurisdiction in . . . cases" involving Members of Congress, *id.*, 635 F.2d at 936, only serves to underscore the need for this Court to address that question here, particularly in light of now conflicting position of the D.C. Circuit.

Branch. Thus, in further supporting its appealability conclusion, the *Myers* court stated:

> . . . the case for pre-trial review of legal defenses is bolstered by the same [separation of powers] concerns that underlie the Speech or Debate Clause. The primary purpose for the appearance of that Clause in the Constitution was "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States* v. *Johnson*, 383 U.S. 169, 181, 86 S.Ct. 749, 755, 15 L.Ed.2d 681 (1966). The opportunity for intimidation by the prosecutors of the Executive Branch would be reduced by the knowledge that prosecutions encountering valid legal defenses will be promptly terminated by appellate courts before trial has occurred.

Id.

Therefore, as recognized in *Myers*, the identity of Petitioner as a Member of Congress infuses the non-Speech or Debate issues he raises with an incidental right, arising from the separation of powers doctrine, not to be subject to trial on federal criminal charges where his legal claims, whatever their substance, may prevent such a trial. This "right not to be tried" inheres in any legal claim made by a Member of Congress challenging the fundamental validity of the criminal charges brought against him by the Executive Branch.

In delineating the scope of the *Cohen* collateral order doctrine, this Court has recognized the crucial distinction:

> . . . between a right not to be tried and a right whose remedy requires the dismissal of charges. . . . The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not.

United States v. *Hollywood Motor Car Corp.*, 458 U.S. at 269. (Citations omitted). The conclusion reached in *Myers* can be expressed in the language of *Hollywood Motor Car* as follows –

legal claims made by Members of Congress whose remedy requires the dismissal of federal criminal charges necessarily encompass a separation of powers right not to be tried.

While *Myers* did not reach its appealability conclusion through the explicit application of the *Cohen* collateral order criteria, it is nevertheless clear that each of the *Cohen* concerns can be accounted for in relation to Petitioner's non-Speech or Debate claims. First, the District Court's decision denying the Congressman's motion to dismiss the indictment constitutes "a complete, formal, and in the trial court, a final rejection" of his claims and their incidental separation of powers right against interference with his representational responsibilities in Congress. *Abney* v. *United States*, 431 U.S. at 659. There are "no further steps that can be taken in the District Court" to avoid the trial's interference with the legislative function which is barred by the separation of powers doctrine. *Id.*

Second, the selective prosecution and preemption claims advanced by Congressman Hansen are "collateral to, and separable from, the principal issue at [his] impending trial, *i.e.* whether or not [he] is guilty of the offense charged." *Id.* Contrary to the government's assertion (Brief for the United States at 6), Petitioner's preemption argument is not the same as the motion to dismiss for failure to state an offense held outside the *Cohen* exception in *Abney* v. *United States*. *Id.* at 663. Unlike the latter claim in *Abney*, the preemption claim here does not center on the elements of the offense and hence the question of guilt; rather, it goes to the question of whether criminal subject matter jurisdiction over the filing of Ethics in Government Act reports exists at all. Therefore, as in his selective prosecution claim, Petitioner's preemption claim contests "the very authority of the Government to hale him into court to face trial on the charge against him." *Id.* at 659. Moreover, it is because these claims do contest the government's authority to hale Petitioner, a Member of Congress, into court that they also implicate the separation of powers bar against impermissible interference with the function of the Legislative Branch by the Executive and Judicial Branches of Government, a concern which is also completely independent of the merits of the action.

It is also noteworthy with respect to the second part of the *Cohen* standard that, unlike the speedy trial claim in *United States* v. *MacDonald*, 435 U.S. 850 (1978), the resolution of Petitioner's non-Speech or Debate claims prior to trial is not a speculative exercise; the claims are completely separable from and independent of the merits of the charges and need not be resolved by reference to facts developed or other "events" at trial. *Id.* at 859. (*See also* Petition at 14).

Finally, Petitioner's separation of powers right against impermissible interference with his legislative responsibilities and the constitutional interests it protects is "effectively unreviewable on appeal from a final judgment." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. at 265. The reversal of a conviction in Congressman Hansen's case will not vindicate the constitutional rights and values incident to the claims he has raised. Such a reversal, dismissing the charges after a trial has occurred, will not prevent or vitiate the chilling effect such a trial has on the independence of the Legislature, nor will it restore the right to representation of hundreds of thousands of constituents lost by virtue of the Congressman's inability to vote or debate in Congress while he was forced to endure an otherwise unnecessary trial. Unlike cases involving speedy trial claims, *United States* v. *MacDonald*, *supra*, or vindictive prosecution claims, *United States* v. *Hollywood Motor Car*, *supra*, "proceeding with the trial" will both "cause" and "compound" the deprivation of the separation of powers rights and values involved here, for it is the trial itself that constitutes the prohibited interference with the legislative function. *Id.* 458 U.S. at 269. The democratic and balance of powers interests inherent in Petitioner's claims "would be 'lost, probably irreparably,' if review had to await final judgment," *Abney* v. *United States*, 431 U.S. at 658. Thus, those interests must be "upheld prior to trial if [they are] to be enjoyed at all." *United States* v. *Hollywood Motor Car Corp.*, 458 U.S. at 270.

Therefore, all of the *Cohen* requirements for the application of the collateral order doctrine are fully satisfied by the non-Speech or Debate claims raised by Congressman Hansen. Accordingly, the District Court's decision denying Petitioner's motion to dismiss the indictment based upon his non-Speech or Debate claims:

> . . . appears to fall in that *small class* which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 546. (Emphasis added).[2] This result is required both by the deference due the Legislative Branch under the separation of powers doctrine, one of the "fundamental principles of the Government established by the Framers of the Constitution," *Buckley* v. *Valeo*, 424 U.S. 1, 120, (1976), and the democratic rights of the people which that doctrine is designed in part to protect.

II. THE SPEECH OR DEBATE CLAUSE PROTECTS EIGA REPORTS FILED BY CONGRESSMEN WITH THE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT

In opposing the grant of certiorari on the question of whether the Speech or Debate Clause protects a Member's filing of financial disclosure reports with the House Committee on Standards of Official Conduct pursuant to the Ethics in Government Act of 1978 (EIGA), 2 U.S.C. §701 *et seq.*, the government both misapprehends and mischaracterizes Petitioner's position.

Petitioner's reference to the distinction between the evidentiary use of EIGA reports permitted in *United States* v. *Myers*, 692 F.2d 823, 849 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 2437 (1983) (*Myers II*), and their use here as the basis of a prosecution under 18 U.S.C. §1001 is intended only to emphasize the much greater importance of the Court's addressing the Speech or Debate claim in this case. Petitioner does not suggest that

[2] Significantly, the application of the exception to the finality rule to claims of this nature does not threaten the fundamental policy against piecemeal appeal in criminal cases since, as noted by the Second Circuit in *Myers*, such claims are necessarily limited to the extremely small class of federal criminal cases against Members of Congress, cases which even the government concedes arise only infrequently. (Brief for the United States at 9).

that distinction somehow tips the scales of Speech or Debate protection here; Petitioner agrees that the use of EIGA reports in evidence is equally prohibited by the Speech or Debate Clause and submits that the *Myers II* ruling on this question is incorrect. The distinction serves only to highlight the importance of this Court's addressing the Speech or Debate question in this case even though it refused certiorari on the same question in *Myers II*.

Petitioner's position that the EIGA reports of Congressmen are protected by the Speech or Debate Clause results from the straightforward application of the test for legislative acts set forth by this Court in *Gravel* v. *United States*, 408 U.S. 606 (1972), *i.e.* the filing of EIGA reports by Congressmen is protected legislative activity because it constitutes "an integral part of the . . . communicative processes by which Members participate in" the Congressional disciplinary process, one of the "other matters which the Constitution places within the jurisdiction of either House." *Id.* at 625. This conclusion in no way derives from or involves the sweeping propositions suggested by the government that "Congress alone can discipline its members" or that "all activity within the orbit of potential congressional discipline is protected against prosecution." (Brief for the United States at 11-12). Like the testimony of the Congressman in front of the Ethics Committee held protected in *United States* v. *Eilberg*, 465 F. Supp. 1080 (E.D. Pa. 1980), an EIGA report is a communication by a Member to the Standards Committee with the purpose of assisting that Committee in supervising the conduct of the Member in question; as such it falls directly within the *Gravel* definition of a legislative act.[3] It is not an activity which is just "somehow related" to the congressional disciplinary function (Brief for the United States at 11); it is a direct and substantial participation by a Member in the

[3] It should be noted that the reference in the comparative analogy appearing in the last sentence of the last full paragraph of page 20 of the Petition should be to the prohibited use of false testimony by Congressman Eilberg in front of the Ethics Committee as the basis of a federal *perjury*, rather than bribery, prosecution. The point made there is confirmed by the government's own observations that the Speech or Debate Clause prohibits equally the use of evidence of legislative acts and the use of such acts as the basis of a criminal prosecution.

discharge of that constitutionally assigned function. This is what distinguishes the filing of EIGA reports from the conduct held prosecutable in the *Bramblett, Diggs, Brewster* and *Johnson* cases relied on by the government. (Brief for the United States at 11-12). Those acts were not even remotely related to a Member's participation in the discharge of the Congressional disciplinary authority under the Constitution.

Moreover, contrary to the government's assertion (Brief for the United States at 12-13), the prosecution of a Member on the basis of his EIGA reports will indeed involve probing and "indirect impairment" of the deliberations of the Standards Committee. *Gravel* v. *United States*, 408 U.S. at 625. Because of the Committee's power under 2 U.S.C. §705 to determine whether particular matters must be reported under EIGA and whether a Member's report is complete under the statute, it will be necessary for the government to obtain evidence of the Committee's views on these requirements in order for it to establish the element of materiality of the matters it alleges Petitioner has wrongfully omitted from his EIGA reports. In fact, the government has already issued a subpoena to the House Clerk and has expressed its intention to subpoena the Staff Director of the Standards Committee seeking such evidence of materiality. As noted in the Petition at 19, n.4, the House has moved for protective relief from the subpoena on Speech or Debate grounds, a motion whose resolution has been postponed because of the stay of the trial.

Finally, the government argues that the provision of a civil remedy in EIGA is inconsistent with Petitioner's Speech or Debate argument. It is Petitioner's position, however, that since the Speech or Debate Clause makes no distinction between civil and criminal proceedings, it would also provide grounds for the dismissal of any civil action that might be brought against a Congressman based upon his EIGA statements. The civil action could survive dismissal only if there existed a constitutionally permissible "institutional waiver" of the Speech or Debate privilege under this Court's analysis in *United States* v. *Helstoski*, 442 U.S. 477, 492-93 (1979). In this regard, it is important to note that Congress enacted EIGA with its civil penalty provision prior to the decision in *Helstoski*. Thus to the extent Congress may have considered the question

of the Speech or Debate status of a Congressman's EIGA reports (although there is no mention of the question in the legislative history), its so-called attempt to "cede" punishment authority over those statements through the civil penalty section may not survive the "waiver" ruling in *Helstoski*. Thus, whether Congress considered "financial disclosure statements to be protected 'legislative acts' in a civil context" (Brief for the United States at 13) is not dispositive of Petitioner's Speech or Debate claim since it is ultimately "the province and duty of this Court 'to say what the law is' with respect to" the scope of the Speech or Debate Clause. *United States* v. *Nixon*, 418 U.S. at 705.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Frank A. S. Campbell
William S. Hemsley, Jr.
HEMSLEY & CAMPBELL
1111 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 659-0550

Counsel for Petitioner

January 1984